Petition

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NO.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

DIBYENDU K. BANERJEE,

Plaintiff,
Petitioner,

V.

BOARD OF TRUSTEES OF
SMITH COLLEGE, et al.,

Defendants,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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NO.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

DIBYENDU K. BANERJEE,

Plaintiff,
Petitioner,

V.

BOARD OF TRUSTEES OF
SMITH COLLEGE, et al.,

Defendants,
Respondents. 1/

QUESTIONS PRESENTED FOR REVIEW

1. Whether it was error, in an employment discrimination case under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981, upon the failure

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1/ The respondents in this case are Smith College and the Chairperson of its Board of Trustees, and President, who are joined in their official capacities. At the time the lawsuit was filed these offices were held by Dorothy Marshall and Thomas C. Mendenhall, respectively. Currently they are held by M. Kathleen Bell and Jill Kerr Conway.

of the defendant to articulate a clear and specific legitimate, non-discriminatory reason for its action in rebuttal to the prima facie case, for the Court to rely upon an explanation not asserted by the defendant.

2. Whether, in an employment discrimination case under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981, the standard of review on appeal of the ultimate finding is that of whether the district court was "clearly erroneous."

3. Whether, in an employment discrimination case under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981, a district court is required to make findings as to the individual reasoning of the persons who participated in the decision.

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The opinion of the Court of Appeals affirming the judgment is reported at 648 F.2d 61 (1st Cir. 1981) and is set out in the Appendix, A.1-10, infra. Its opinion denying rehearing is set out at A.11-13. The opinion of the District Court, without subsidiary findings of fact, is reported at 495 F.Supp. 1148 (D. Mass. 1980). It is set forth completely at A. 15-122.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the District Court was entered on April 21, 1981. After timely petition, rehearing was denied by order of June 19, 1981. (A. 124). Thereafter, the suggestion for rehearing en banc was denied on June 26, 1981. (A.125). Jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §20003-2, provides, in pertinent part:

> (a) It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

The Civil Rights Act of 1866, 42 U.S.C. §1981, provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

This is a lawsuit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., and under the Civil Rights Act of 1866, 42 U.S.C. §1981, brought against Smith College, for race and national origin discrimination in the denial of academic tenure and the termination of plaintiff's employment. 2/

Plaintiff, Dibyendu K. Banerjee (Ron Banerjee), is a non-white person of Indian (Bengali) origin. He is a specialist in English and Comparative Literature and holds a Ph.D. in Comparative Literature from Harvard University, with concentration in English, French and Italian, which he received with distinction. Plaintiff was appointed to the English Department

2/ Jurisdiction is based upon 42 U.S.C. §2000(e) - 5(f)(3); 28 U.S.C. §1331(a); 28 U.S.C. §1343(4).

of Smith College in 1966 and, after successive reappointments, was presented for tenure in 1971-72.

Smith College is a private, undergraduate liberal arts educational institution, located in Northampton, Massachusetts. Like most similar institutions of higher eduation in the United States, it employs the "tenure" system of employment. See Delaware State College v. Ricks, U.S. , 101 S.Ct. 498 (1980). Under that system, fulltime faculty members are required to receive "tenure of office" in order to continue to be employed beyond a specified probationary period. During this period the faculty member undergoes several evaluations in connection with reappointment and, finally, is evaluated for tenure.

At Smith, the award of tenure was governed by written substantive criteria

which were found in the Faculty Code. Since it was an undergraduate institution, the emphasis was on teaching, and there was no requirement of written scholarship at all. The version of the Code applicable to plaintiff had been applied in many prior cases.[3/]

Procedurally, the tenure evaluation process started with a recommendation from the department. At the time plaintiff was presented, a departmental recommendation was generally decisive.[4/] However in the case of the English department no prior

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3/ According to the former President, the criteria were in effect at least since 1959. From 1962-63 to 1974-75, thirteen English Department candidates, all of them white, were granted tenure under this version of the standards, including persons who had published practically nothing and persons who wrote no scholarly works at all.

4/ In the ten prior years, out of 109 recommendation college-wide, only two positive and five negative recommendations had been rejected.

candidate -- whether recommended or not -- had been rejected. After departmental consideration, the issue went to the college-wide Tenure and Promotion Committee ("T&P") which consisted of the President of Smith, who presided, and the Dean of Faculty, both ex officio, and five professors elected by the faculty at-large for staggerred five year terms. As a practical matter, the T&P decision was dispositive since an unfavorable decision by the T&P was final and favorable recommendations to the Trustees were invariably followed.

Plaintiff was the first minority person ever to be appointed to the English Department, and the only one ever to be presented for tenure.[5/] When presented

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5/ Had he been granted tenure, as an Indian teaching English, he would have been the single tenured minority person teaching in a field not directly related to his ethnicity, such as Hispanic studies, Afro-American studies, and so forth.

in 1971 he received the official recommendation of the department. His teaching was highly regarded,[6] and he had published in respected scholarly journals.[7] Nevertheless, he was denied by a divided vote of the T&P in the Spring of 1972. According to the District Court, those who opposed him "tended to focus on perceived deficiencies in plaintiff's scholarship." (A.57).

After a successful procedural complaint to a college grievance committee, plaintiff's candidacy was considered once again, but on May 29, 1974, he was again denied.

Plaintiff's complaint to the EEOC ensued, and later this lawsuit.

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[6] He was assigned to teach Shakespeare in every semester he was at Smith, itself a sign of the department's respect for his teaching.

[7] The record contains letters praising plaintiff's scholarly contributions from such scholars of international repute as Ignazio Silone and Robert Fitzgerald. By contrast, some of plaintiff's colleagues were granted tenure without ever submitting any written work to the T&P.

After considerable pre-trial discovery the case came on for trial on April 11, 1980. At trial Smith contended that plaintiff lacked the minimum qualifications for tenure under the college standards, practices or customs, and therefore, failed to make the prima facie case.[8] The District Court issued its decision on June 30, 1980. The essence of its reasoning is contained in its "Evaluative Findings" (A.53). The court rejected Smith's contention about plaintiff's qualifications. It found, instead, that plaintiff was qualified[9]

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[8] Defendants' Post-Trial Brief, pp. 8-11.

[9] At trial, over the defendants' objections, plaintiff was qualified as an expert witness in his field of scholarship, Comparative Literature, more specifically, T.S. Eliot and Dante. By contrast, defendants' proposed expert witness, a professor from the University of Chicago, who had been retained to testify regarding plaintiff's scholarship, could not be qualified in the subject matter area; he was permitted to testify only as to his opinion of plaintiff's writing style, and not as to the scholarly contribution.

for tenure under the standards which had theretofore been applied to white candidates and furthermore, that plaintiff would have been "valuable" had he been retained. Accordingly, the court found that the plaintiff had made a prima facie case of racial and national origin discrimination, which required an explanation. (A.53-57).

The District Court and thereafter the Court of Appeals found that the reason for the difference in treatment was that Smith had raised its minimum requirements for tenure. Plaintiff was not considered to have met the new, more stringent standard, which had been adopted to take advantage of a favorable employment market. (A.59-60; A.5, n.5; A.8-9). The District Court found that plaintiff was denied because his scholarship, although adequate, was not considered "distinguished." (A.58).

As characterized by the appeals court, plaintiff was held to the standard of "excellence," rather than the standard of "mere competency" (A.5, n.5) which had been applied in prior cases. (A.8-9). Although plaintiff's teaching might have been considered "exceptional," his scholarship and "colleagueship" were not. (A.5, n.5).[10/] Assessing the validity of the explanation, the lower courts ruled that it was not discriminatory to apply a higher standard to plaintiff that was imposed across the board (A.9; A. 59-60), and the appeals court therefore affirmed the dismissal of plaintiff's complaint.

However, this was not the reason supplied by Smith College. Throughout this lawsuit, Smith has asserted a single

10/ The reference to "colleagueship," represented somewhat of a departure from the findings of the District Court which found the denial to be due to perceived deficiencies in plaintiff's scholarship.

reason for its action: that plaintiff did not receive tenure because he did not receive a sufficient number of favorable votes, those not voting for him believing that his qualifications were not good enough.[11/] Both courts below rejected

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11/ The District Court found that the reason articulated by Smith was the following, (A.55):

> "Plaintiff was denied tenure because he did not receive the requisite number of votes from members of the Committee on Tenure and Promotion of Smith College. Since the vote of the Committee was a group decision, no single reason or set of reasons can be provided as to why the Committee voted as it did. In general, the Committee determined, based on all of the materials that were available to it, that the breadth and depth of the plaintiff's scholarship, considered in considered in conjunction with the quality of his teaching and his service to the college, did not in the Committee's best judgment warrant an award of tenure."

continued.

plaintiff's argument that judgment in his favor was required because the reason was insufficient to meet the prima facie case (A.5; A. 55-57).

Plaintiff also argued in the Court of Appeals that there were several errors in the legal reasoning of the District Court, and that on the basis of the findings of fact, and the undisputed evidence, the prima facie case compelled judgment for the plaintiff. See Texas Dep't of Community Affairs v. Burdine, U.S. , 101 S.Ct. 1089, 1094 (1981). The Court of Appeals rejected these arguments, citing its rule, which it had previously adopted in Sweeney v. Board of Trustees of Keene State College,

11/ continued.

This reason was first introduced into the litigation as an answer by Smith to plaintiff's interrogatory; and thereafter was consistently adhered to by Smith as the complete explanation for its decision in this case. (A.106).

604 F.2d 106, 109, n.2 (1st Cir. 1979), on remand of 439 U.S. 24 (1978), that in discrimination cases review of ultimate as well as subsidiary findings is to be governed by the "clearly erroneous" rule of F.R. Civ. P. Rule 52(a) (A.7, 10).

Finally, the District Court failed to make any findings on the individual reasoning of those members of the T&P who did not support plaintiff's candidacy, even though a considerable portion of the evidence was devoted to this aspect of the case. The Court of Appeals held that such findings were not required and that conclusory findings of the trial court that the members of the T&P were not motivated by race or national origin were sufficient. (A.7-8).

The Court of Appeals affirmed on April 21, 1981 (A.1). Thereafter,

plaintiff filed a petition for rehearing with a suggestion for rehearing en banc, to which the court ordered defendants to respond. (A.123). On June 19, 1981 the panel denied rehearing (A.124), and on June 26, 1981 denied the suggestion for rehearing en banc. (A. 125).

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted To Decide Whether The Reason Articulated By The Defendant Smith College Met The Requirements of Texas Dep't of Community Affairs v. Burdine, U.S. , 101 S.Ct. 1089 (1981) And, If Not, Whether The Court Below Properly Considered A Reason Not Asserted By The Defendant.

There are three substantial reasons for granting certiorari to consider this question.

First, the case entails an important question of interpretation regarding this Court's ruling in Texas Dep't of Community

Affairs v. Burdine, U.S. , 101 S.Ct. 1089, 1096 (1981) that "the defendant's explanation of its legitimate reasons must be clear and reasonably specific." The only explanation ever advanced by Smith College for plaintiff's rejection was the fact that a majority of the individual T&P members failed to support him because they did not think that he was good enough -- by whatever standard they individually decided to apply. Smith has not asserted that its standards were ever raised, or if so, to what level. In fact, in the entire course of this litigation Smith has never even made a contention as to what standard of qualification -- whether "competence," "excellence," or whatever -- was applied to plaintiff i.e., what level of qualification, if any, would have commanded a sufficient number of T&P votes to secure tenure for

him. Smith's reason is thus entirely consistent with discriminatory intent. It does not meet plaintiff's prima facie case, because it does not provide any answer to the basic question posed by the presumptive case of discrimination: why was plaintiff treated more harshly than his white predecessors? Unlike the courts below, other federal courts have required the employer to articulate a reason which provides an explanation inconsistent with discriminatory intent thus raising an issue of fact. See Taylor v. Teletype Corp., 648 F.2d 1129, 1138 (8th Cir. 1981) (individual explanations in rebuttal of class action prima facie case); E.E.O.C. v. American National Bank, F.2d , 26 F.E.P. Cases 472, 485 (4th Cir. June 26, 1981) (class action) Shaw v. Boorstin, F.Supp. , 25 F.E.P. Cases 56, 61 (D.D.C. June 16, 1981) (individual claim).

Second, the case presents the issue of whether, in the absence of a valid explanation, a court may rely upon a reason not articulated by the defendant. Recognizing that Smith's articulated reason did not meet the level of specificity contemplated by this Court in Texas Dep't of Community Affairs v. Burdine, supra, the Court of Appeals held that it was proper for the District Court to make its own review of the evidence in search of a neutral explanation for the disparate treatment. It said:

> If a criticism is to be made of Smith's assertion of its reason, it would be that the alleged ambiguity resulted in inadequate specificity. As Burdine points out, see also, Loeb v. Textron, Inc., 1 Cir., 1979, 600 F.2d 1003, 1011-12 n.5, articulation is required to enable the plaintiff to know what to meet in order to prove pretext -- the best way of proving a bad reason being to show the incorrectness of the claimed good one.

> It is understandable, however, that the clarity of articulation of reasons for refusing tenure by such collegial decision-making apparatus as that involved here may differ from that given by a business employer. But if Smith's answer to the interrogatory was inadequate, we are satisfied that the evidence introduced at the trial more than met the requirements. (A.5).

The explanation credited by both lower courts was that Smith had raised its standards. But Smith has not advanced this contention at any point in the litigation. It introduced no evidence that the standard for tenure was raised, or that "excellence" or "distinction" was demanded of any other candidate, ever.[12/] The Court of Appeals

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12/ The written standards were not raised. They were not revised in any way until well after plaintiff's case, in September, 1975. There was no evidence introduced that the Board of Trustees, or the T&P, had ever decided to apply a higher standard, or if so, when. Plaintiff was never informed of any change. There were no minutes of T&P deliberations showing the application of the higher standard to other candidates.

continued.

drew its inference from a review of statements found in the official minutes of the tenure committee in plaintiff's case alone. (A.5, n.5).[13]

[12] continued.

Smith did not even introduce evidence that contemporaneous candidates were considered under the same standard as plaintiff. There were two unsuccessful, white candidates in 1971-72, who unlike plaintiff, received adverse departmental recommendations. As to them, trial counsel for Smith represented that "[w]e do not seek to prove and will not argue that [they] were as or more qualified than Mr. Banerjee." There was one candidate considered contemporaneously with plaintiff in 1974, a white male who was granted tenure. The minutes of the T&P in regard to his candidacy were never introduced.

[13] If anything, the evidence was that after the plaintiff, the standards were relaxed. After plaintiff was denied, Smith granted tenure at one stroke to a number of teachers who were not even eligible under the written "tenure track" criteria. These were the holders of the "long-term non-tenure contract[s]" to which the Court of Appeals referred at A.4, n.3, and who, to use the court's phrase, were entitled to no more than "second prize" (id.); but they were given first, i.e. tenure. This was because they were considered to be "useful." One of these, the Chairperson of the English Department at the time of trial, was granted tenure in 1975 without ever having submitted a single piece of scholarship to the T&P.

It is fundamental to the method of adjudication set forth by this Court in Burdine, supra, that a reviewing court is bound by the rationale urged by the party defending the actions under review, and may not supply one that has not been asserted. Obviously, the employer is in the best position to know why it acted as it did. One may presume that it will articulate a reason if it has one. If a defendant's articulation is not binding, a Title VII plaintiff will have to explore and refute an almost infinite series of other possible explanations which a court might adopt, trials will be enormously lengthened and complicated, and discovery will necessarily be broader and more intrusive. Moreover, even if there were some cases in which a court may satisfy itself as to a non-discriminatory explanation absent clear articulation by the defendant, this

would be particularly, if not uniquely, inappropriate when the explanation is that of increased standards. Unless an employer itself is required to make an unambiguous assertion of the stricter standard, it is free to continue to apply the lower standards to succeeding white candidates.

The decision of the Court of Appeals to sanction reliance upon a non-asserted rationale raises serious question as to whether an individual litigant is to be afforded a "full and fair opportunity," Burdine, at 1096, to prove discrimination under Title VII. This case was litigated on a scope well beyond the power of most individual litigants. Plaintiff extensively developed every theory and rationale even suggested in pre-trial discovery. The nine day trial of this case was preceded by 19 depositions, multiple sets of

interrogatories, and production of thousands of pages of documents. Yet the first mention of a raised standards rebuttal was in the opinion of the District Court. With prior notice plaintiff would have compared his case with later tenure cases of persons hired during the period of his probation and tenure consideration -- surely a reliable means to determine whether standards were really raised or not. There was no occasion for such proof since discovery, and particularly Smith's vague articulation of its reason, did not give fair notice of the defense.[14/]

14/ Smith in fact objected to production of documents concerning tenure cases in 1975-76 on the ground that they "were considered well after plaintiff's case was considered . . . and which neither Smith nor plaintiff has previously cited or relied on as having anything to do with their respective cases." Memorandum of the Defendant The Trustees of the Smith College In Support of Motion to Modify Subpoena, p. 5.

Third, the case raises fundamental questions as to the applicability of discrimination law to the academic tenure context. Smith's argument in the lower courts was that it had no obligation to rationalize the treatment of plaintiff with that afforded to prior, white candidates other than

to point out that the prior decisions were made by different T&P's. Smith contended that these prior committees, although headed by the same President, had different memberships and therefore that comparisons between and among their decisions were meaningless. In reality, the argument was a rejection of the prima facie case itself, which was premised upon precisely this disparate treatment. This Court has never excused a corporation from providing non-discriminatory reasons for disparate treatment simply because its decisions were made by different individuals. If the logic were correct, this Court could not in Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) have upheld the prima facie statistical case of disparate treatment against a corporation employing over 6000 persons, made on the basis of numerous decisions,

by different individuals, in different cities, over a period of years. Under Smith's analytical model, all statistics and practically all comparisons would be irrelevent and actionable corporate discrimination would be almost non-existent.

Like other kinds of corporations or government institutions, Smith was not a momentary association of individuals which came together for plaintiff's case and then dispersed. Rather, it was an institution with a continuing existence and a governing structure, with a Board of Trustees and with written criteria for tenure which had been applied by its officers and committees on many occasions.

The case thus directly raises the question of whether the prima facie case method of adjudication and the division of burdens developed by this Court in its previous employment discrimination

cases apply to the question of discrimination in the grant of academic tenure. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Furnco Construction Co. v. Waters, 438 U.S. 567 (1978); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1979); Texas Dep't of Community Affairs v. Burdine, U.S. , 101 S.Ct. 1089 (1981).

Discrimination in academic employment has been the subject of extensive litigation in the lower federal courts in recent years. See e.g. Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980) (tenure); Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980) (tenure); Jepsen v. Fla. Bd. of Regents, 610 F.2d 1037 (5th Cir. 1980) (promotion); Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169 (1st Cir. 1978) and 604 F.2d 106 (1st Cir. 1979) (promotion); Davis v. Weidner, 596 F.2d 726 (7th Cir. 1979) (reappointment);

Powell v. Syracuse University, 580 F.2d 1150 (2d Cir. 1978) (reappointment); Faro v. New York University, 502 F.2d 1229 (2d Cir. 1974) (reappointment); Campbell v. Ramsay, 484 F.Supp. 190 (E.D. Ark. 1980) (reappointment); Huang v. College of the Holy Cross, 436 F.Supp. 639 (D. Mass. 1977) (tenure). But these courts have not achieved unanimity on the requirements of either the prima facie case, or the reubttal.

This Court has once summarily considered a case involving academic promotion, Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) and a case involving a procedural defense to a tenure discrimination claim, Delaware State College v. Ricks, U.S. , 101 S.Ct. 498 (1980), but it has not yet considered any issue relating to the merits of discrimination in academic tenure. This case provides

a suitable vehicle to consider this question. The voluminous record contains a thorough review of the tenure process at an undergraduate college on both an individual and class basis. There is an extensive exploration of the reasoning of the individual participants, as well as a close examination of the general pattern of tenures, and of the treatment of minority faculty in general.

II.

Certiorari Should Be Granted To Decide Whether the Court of Appeals Should Have Applied The Clearly Erroneous Rule To The Reasoning Leading To The District Court's Ultimate Findings.

In the Court of Appeals the plaintiff argued that there were a number of flaws in the reasoning of the District Court which led it to its ultimate conclusion of no discrimination and that the findings of that court and the undisputed evidence actually required judgment for plaintiff. Inter alia, plaintiff argued that the

Court erred in holding that the prima facie case did not compel judgment in the absence of articulation a valid reason, (A.32-41 , compare Burdine, supra at 1094) and that it erred in leaving with the plaintiff the burden of proving that disparate treatment, once shown, was in fact actuated by race or national origin (A.58-60). The Court of Appeals disposed of the series of arguments by applying its rule that even ultimate findings in discrimination cases are to be reviewed by the "clearly erroneous" rule of F.R. Civ. P. Rule 52(a). See Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106, 109, n.2 (1st Cir. 1979). This was error. United States v. U.S. Gypsum Co., 333 U.S. 365 (1948); United States v. General Motors, 384 U.S. 127 (1966); Causey v. Ford Motor Co., 516 F.2d 416 (5th Cir. 1975). This Court has already granted certiorari to consider

this question in United Steelworkers of America v. Swint, No. 80-1193, U.S. , 101 S.Ct. 1972 (1981).

III.

Certiorari Should Be Granted To Decide Whether The Court Of Appeals Properly Held That No Findings Had To Be Made On The Individual Reasoning Of The Persons Who Participated In The Tenure Decision.

Especially if the limited review described by F.R. Civ. P. Rule 52(a) applies to the ultimate findings of discrimination vel non it is essential that the requirement of findings, found in the same rule, be observed. Here the Court of Appeals held that it was unnecessary for the District Court to make findings on the individual reasoning of T&P members. The holding of the appeals court that conclusory findings are sufficient conflicts with that of the Fourth Circuit in E.E.O.C. v. United Virginia Bank, 555 F.2d 403 (4th Cir. 1977).

The absence of detailed findings made a significant difference to the review of the case. In 1972 two members of the committee who voted against plaintiff expressed views to the effect that his credentials were fraudulent and that he should not even have received the Ph.D. degree from Harvard.[15] Defendants argued that no findings on these reasons had to be made because the facts were not in dispute. But the two voters, themselves, constituted the margin of difference in the first round.[16] And their evaluation of plaintiff's credentials differed completely from that made by the District Court. Yet, neither the District Court nor the Court of Appeals have given any indication why they concluded, if they did, that

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15/ Professor De Villafranca (Ex.364, Vol. 1, p.58, Vol. 2, p.5); Professor Harward (Ex.42).

16/ The vote was four against, one in favor, and one abstention.

these reasons were not pretextual. The absence of findings on the point removed the issue from review.

CONCLUSION

For the foregoing reasons, petitioner prays that his petition of writ of certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Max D. Stern, hereby certify that I have this day served three copies of the Petition for Writ of Certiorari upon the defendants, respondents, by mailing copies of same, U.S. postage prepaid to William Patton, Esq., Ropes & Gray, 225 Franklin Street, Boston, MA. 02110.

Max D. Stern

Dated: September 17, 1981.

NO.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

DIBYENDU K. BANERJEE,

Plaintiff,
petitioner,

V.

BOARD OF TRUSTEES OF
SMITH COLLEGE, et al.

Defendants,
respondents.

APPENDIX

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United States Court of Appeals
For the First Circuit

No. 80-1475

DIBYENDU K. BANERJEE,

PLAINTIFF, APPELLANT,

v.

BOARD OF TRUSTEES OF SMITH COLLEGE ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ROBERT E. KEETON, *U. S. District Judge*]
(495 F.Supp. 1148)

Before COFFIN, *Chief Judge*,
ALDRICH, *Circuit Judge*,
and MCNAUGHT*, *District Judge*.

Max D. Stern, with whom *Stern & Shapiro* was on brief, for appellant.

William L. Patton, with whom *John H. Mason*, and *Ropes & Gray* were on brief, for appellees.

Jack Greenberg, *Charles Stephen Ralston* and *Gail J. Wright*, on brief for the NAACP Legal Defense and Educational Fund, Inc., amicus curiae.

Leroy D. Clark, General Counsel, *Constance L. Dupre*, Acting Associate General Counsel, *Vincent Blackwood*, Assistant General Counsel, and *Joel M. Cohn*, Attorney, on brief for the Equal Employment Opportunity Commission, amicus curiae.

April 21, 1981

ALDRICH, *Senior Circuit Judge*. This is an appeal by an unsuccessful candidate for professorial tenure, Dibyendu K. Banerjee, a Bengali Indian, whose application was finally rejected by the Committee on Tenure and Promotion (T & P) of

* Sitting by designation.

Smith College in May, 1974. Banerjee thereafter complained to the Massachusetts Commission Against Discrimination (MCAD) and the Equal Employment Opportunity Commission (EEOC), and in 1976, shortly after receiving a right to sue letter, brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and under the Civil Rights Act of 1866, 42 U.S.C. § 1981.[1] Present defendants are the trustees of the college, and others, in their official capacities. For convenience we will speak of them, collectively, as Smith. The action was voluntarily dismissed against certain persons sued individually. We draw no inference against plaintiff from this. After a nine day bench trial, which included the submission of stipulations and a number of depositions, the court rendered an extensive opinion, 495 F.Supp. 1148: introduction and discussion of legal principles (7 pages); chronology (57 items, from application to final rejection); evaluative findings (3 pages), and subsidiary findings (28 typewritten pages, not published). On the basis thereof it dismissed the complaint.

Adapting *McDonnell Douglas Corp.* v. *Green*, 1973, 411 U.S. 792, to the case before it, the court held the elements of plaintiff's prima facie case to be the following.

> "(1) that plaintiff is a member of a racial or national origin minority;
>
> (2) that plaintiff was a candidate for tenure and was qualified under Smith College standards, practices or customs;
>
> (3) that despite his qualifications plaintiff was rejected; and
>
> (4) that tenure positions in the Department of English at Smith College were open at the time plaintiff was denied tenure, in the sense that others were granted tenure in the department during a period relatively near to the time plaintiff was denied tenure." 495 F.Supp. at 1155.

[1] Concededly, so far as liability is concerned in this case, the rights are identical.

With respect to the second element, plaintiff's qualifications, the court held that he

> "need only show that he was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made. That is, he need show only that his qualifications were at least sufficient to place him in the middle group of tenure candidates as to whom both a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion by the tenure-decision making body." 495 F.Supp. at 1155-56.

Cf. Powell v. *Syracuse University*, 2 Cir., 1978, 580 F.2d 1150, 1155, *cert. denied*, 439 U.S. 984.

We agree with the court' s formulation. We also, of course, agree that establishing a prima facie case would require the defendant to "articulate some legitimate, nondiscriminatory reason" for its action. *McDonnell Douglas Corp.* v. *Green*, ante, 411 U.S. at 802; *see Board of Trustees of Keene State College* v. *Sweeney*, 1978, 439 U.S. 24.[2] The burden is then upon plaintiff to show the reason pretextual, and by process of eliminating legitimate reasons, that the decision was governed by an illegitimate one. *Furnco Construction Corp.* v. *Waters*, 1978, 438 U.S. 567, 577.

The court found that plaintiff had made out a prima facie case, but that defendant had articulated a valid reason which it was satisfied was nonpretextual. On appeal both parties, while focusing briefly on the prima facie case, devote most of their energies to the "rebuttal" phase, the articulation of a legitimate reason and the showing of pretext.

Under familiar principles, *e.g.*, *Hilton* v. *Wyman Gordon Co.*, 1 Cir., 1980, 624 F.2d 379, 383, plaintiff faces the burden of showing the district court's findings to have been erroneous. This he may do either directly or indirectly by showing some underlying error of law. *Sweeney* v. *Board of Trustees of*

[2] Subsequent to the court's opinion, and to oral argument herein, the Court spelled this matter out in more detail. *Texas Department of Community Affairs* v. *Burdine*, U.S. (3/4/81) 49 U.S.L.W. 4214, n.4, post.

Keene State College, 1 Cir., 1979, 604 F.2d 106, 109 n.2, *cert. denied*, 444 U.S. 1045. In recognition of this, plaintiff assays three main points.[3] The first is that defendant failed to articulate "a valid, legitimate, nondiscriminatory reason."

The district court found,

> "The reason articulated[4] by Smith for the denial of tenure was as follows:
>
> > Plaintiff was denied tenure because he did not receive the requisite number of votes from members of the Committee on Tenure and Promotion of Smith College. Since the vote of the Committee was a group decision, no single reason or set of reasons can be provided as to why the Committee voted as it did. In general the Committee determined, based on all of the materials that were available to it, that the breadth and depth of the plaintiff's scholarship, considered in conjunction with the quality of his teaching and his service to the college, did not in the Committee's best judgment warrant an award of tenure. . . ." 495 F.Supp. at 1159-60.

After characterizing this, generally, as "stated with considerable ambiguity," plaintiff says that these three sentences in fact constitute three reasons, and that all are invalid. The first, he says, that he did not get the votes , "as meant to supply an explanation" supplied none at all. We do not consider this sentence as "meant to supply an explanation"; it merely, as the

[3] Point 4, that, alternatively, plaintiff should have received a long-term non-tenure contract, is a claim so out of keeping with the "tenure track" here involved as not to require discussion. There is normally no second prize, and plaintiff did not fit the special cases to which he refers.

[4] The Court has since spelt out more fully the meaning of "articulate," as requiring "the introduction of admissible evidence . . legally sufficient to justify a judgment for the defendant." *Texas Department of Community Affairs* v. *Burdine*, ante n.2. In the present case Smith's reason was supplied by an answer to an interrogatory which the record shows was accepted by plaintiff. If, strictly, it was not "introduced," any deficiency was repaired by Smith's subsequent testimony in connection with plaintiff's response.

court itself said, *id.* at 1160, stated the procedure. As to the second, plaintiff asks, since not all of the T & P members who were against him gave the same reason, "which does Smith stand behind?" "Smith is *required* to give a justification," (Emphasis in orig.) and since Smith, as an entity, cannot "articulate its own justification. . . plaintiff should win his case." Plaintiff would take the third sentence as subject to two interpretations. (a) The committee believed plaintiff's scholarship did not meet Smith's minimum standards, but was wrong. We need not pursue what plaintiff claims should follow from this; one cannot interpret a sentence by excising part of it. (b) The committee felt plaintiff's scholarship lacked distinction. Again, plaintiff takes only part of the sentence.

If a criticism is to be made of Smith's assertion of its reason, it would be that the alleged ambiguity resulted in inadequate specificity. As *Burdine* points out, *see also*, *Loeb* v. *Textron, Inc.*, 1 Cir., 1979, 600 F.2d 1003, 1011-12 n.5, articulation is required to enable the plaintiff to know what to meet in order to prove pretext — the best way of proving a bad reason being to show the incorrectness of the claimed good one. It is understandable, however, that the clarity of articulation of reasons for refusing tenure by such collegial decision-making apparatus as that involved here may differ from that given by a business employer. But if Smith's answer to the interrogatory was inadequate, we are satisfied that the evidence introduced at the trial more than met the requirements.[5] We do not ac-

[5] There was introduced the minutes of some twelve meetings of the T and P committee over a period exceeding two years, and the testimony of five of its seven members, together with that of its chairman, Smith's president. The T and P members not only read, to a substantial degree, plaintiff's dissertation, articles, poems, and outside evaluation, but met on more than one occasion with the members of the English Department. From all of this it is sufficiently clear that at least a large majority most of the time and, at the time of final vote on May 29, 1974, all of the T and P committee were of the opinion that all applicants for tenure should be judged by higher standards of excellence than mere competency, that plaintiff's strength lay in teaching, but whether or not his performance in teaching could be said to be exceptional, the overall quality of his scholarship (variously criticized for substance, lack of originality, and writing style) and "colleagueship" were not.

cept plaintiff's contention, ante, that all members of the committee had to agree on their reasoning. It cannot be that all members must agree on a single reason, except in an ultimate conclusion; the requirement is that they should not reach this by improper ones.

Plaintiff's second point is that he proved defendant's reason pretextual "as a matter of law,"[6] but the district court "failed to appreciate" this because it "held a fundamentally erroneous view of the legal significance [*i.e.*, effect] of the prima facie case." The district court gave the matter extensive analysis, concluding, as to the consequences, that probative weight must continually be given to the evidence or inferences which established the prima facie case, but that it has no special magic, once defendants introduce evidence in rebuttal. Plaintiff in no way demonstrates this to be an incorrect legal conclusion, or even argues it, except to quote a sentence from one of our previous opinions which, in fact, accords with the district court's conclusion.[7] Instead, plaintiff proceeds to argue at length that the court made mistakes of fact. Had these alleged mistakes been due in part to the application of a legally erroneous understanding of the "prima facie case," plaintiff's complaint would have force. It is quite clear, however, that they were not; there is no basis for plaintiff's claim that the court made an error of law.[8]

Before leaving this subject we address the amicus brief filed

[6] For the benefit of the lay reader this is a legal expression meaning established beyond dispute. If it were so established, that would be the end of defendant's case.

[7] "We may assume that the evidence used to establish the prima facie case remains relevant, and can help sustain a verdict for the plaintiff if the employer's reason is discredited . . . ." *Loeb* v. *Textron, Inc.*, 1 Cir., 1979, 600 F.2d 1003, 1015 n.14.

[8] Plaintiff argues a further matter, perhaps led on by the court' s discussion, whether, if nothing is presented in rebuttal of a prima facie case, the prima facie case "compels," or only "warrants," a finding in plaintiff's favor. Since defendant did respond, we are not concerned with that question. ("Compel" has since become the correct answer. *Texas Department of Community Affairs* v. *Burdine*, ante, n.2.)

by the NAACP Legal Defense and Educational Fund, Inc. (NAACP) with the consent of the parties. This charges the court with improperly imposing upon plaintiff a "more burdensome and more convoluted" standard in order to make out a prima facie case. We find no indicia of this in the court's opinion, ante. But were there error, the degree would be irrelevant because, whatever the standard, the court found that plaintiff met it.

Secondly, we note the NAACP' s complaint that the court's opinion "suggests that there are different levels of a prima facie case." Presumably by "levels" is meant "weight," or "strength." Whether the court made such a suggestion or not, it is correct so far as its effect upon the case as a whole is concerned. Surely when the trier of fact is determining whether the defendant's articulated reason is "pretextual," the strength of the inferences arising from the evidence that creates the prima facie case must vary, depending upon the nature of that evidence.

We turn to consider whether, although there were no underlying legal errors, the court's failure to find for the plaintiff on the evidence as a whole was clearly erroneous. One approach to this question is the issue phrased by the EEOC in its amicus brief:[9]

> "Whether the district court erred as a matter of law in holding that Smith College had rebutted plaintiff's *prima facie* case by stating that he was denied tenure because of

[9] At the same time we remark that the prime, if not sole, purpose of an amicus curiae brief is what its name implies, namely, to assist the court on matters of law. While, presumably, an amicus' position on the legal issues coincides with one of the parties, this does not mean that it is to engage in assisting that party with its evidentiary claims. *New England Patriots Football Club, Inc. v. University of Colorado*, 1 Cir. 1979, 592 F.2d 1196, 1198 n.3. After properly arguing the sufficiency of defendant's articulation, over half of the EEOC's 25 page brief is directed to discussing the facts favorable to plaintiff, and much of the balance simply repeats the leading Supreme Court cases and our own opinions with which we are thoroughly familiar. Regardless of whether filed with the consent of the parties, the first was improper; the second unnecessary.

> an adverse vote of the tenure committee [T & P] without making any findings concerning the specific reasons underlying the decisions of the individual members of the tenure committee."

It is true that the court found that T & P was the principal arbiter of plaintiff's fate. However, the EEOC overstates the court's obligation. The court did not have to find the full reasoning of each T & P member. Its duty was to find whether or not the T & P members, or enough of the members, voted against plaintiff because of an intent to discriminate. The court put this question early on. Plaintiff would make out his case if he were

> "to show that a specified number of members of the Tenure and Promotion Committee voted adversely to him, that a determinative factor in their decisions to vote adversely was plaintiff's race or national origin, and that had they voted affirmatively plaintiff would have been granted tenure." 495 F.Supp. at 1151.

Subsequently the court answered this:

> "Plaintiff has not demonstrated that any member of T & P who voted on his case, either at the initial consideration or at the reconsideration, voted against him because of plaintiff's race or national origin." *Id.* at 1160.

For good measure the court added,

> "Nor has plaintiff established that any members of the English Department voting on his case, either initially or upon reconsideration, voted adversely to plaintiff on account of his race or national origin." *Id.*

The court then discussed the factors which had resulted in the three-sentence reason given by defendants quoted at the outset of this opinion, and found them acceptable. We need not follow its course item by item, but confine ourselves to certain matters that plaintiff emphasizes. First, plaintiff points to the court's findings that, to some extent, the members of T & P may have tested his scholarship against a somewhat higher

standard than had been used (by previous members) in the previous decade. The court found, however, that this was because the times were favorable for so doing, and not in order to discriminate against plaintiff. There was adequate evidence to support this finding, including statistics,[10] the absence of which in some other respects plaintiff complains, post. The court further found that certain procedural irregularities arising out of a changed vote, in plaintiff's disfavor, by one of the English Department members (itself warrantably found to have been in good faith) were not discriminatorily intended. This finding, too, was warranted.

This brings us to plaintiff's third major point, that the court failed in the duty imposed on it by F.R. Civ.P. 52(a) to deal with certain evidence offered against defendant as an entity, as well as against the T & P and English Department members individually. Insofar as this is a procedural objection, much of this evidence was introduced by stipulation; the court need not go through the process of repeating it as findings. Nor need it, in making its ultimate findings, make reference to every item of evidence introduced in a nine day trial and indicate why it failed to be persuaded thereby. It is enough that the findings "are sufficient, in the context of the whole record, to reveal the basis for the court's decision and thus permit review." *United States* v. *Hudspeth*, 9 Cir., 1967, 384 F.2d 683, 686 n.4.

Substantively, plaintiff points particularly to two categories of evidence. First, he says that the district court failed to give proper weight to his "direct" evidence of discrimination. Much so characterized, however, consists simply of non-probative evidence accompanied by speculation. Other items

[10] There was substantial evidence that whereas in the 1960's good faculty had been hard to find, the 1970's saw a "new professional situation" — a glut of qualified applicants out of graduate school, which coincided, at Smith, with a period of many fewer faculty retirements than in the decade before, and of fiscal restraints on new hiring and reappointments. The percentage of decisions resulting in tenure dropped from 89% (79/89) in 1960-69 to 74% (67/91) in 1969-76.

are minor examples of what assuredly may have constituted poor judgment, and hence may have circumstantial value, but they are hardly "direct" or compelling evidence of racial bias.

Plaintiff also objects to the court's failure to make findings concerning his statistical evidence. Basically, this evidence was that from 1966 to 1974, "the average proportion of tenured minority faculty to all minority faculty was 23.3%, while the comparable proportion of all faculty on tenure to all faculty was approximately double as much." It would have been well to make reference to this; statistical evidence of faculty composition may be probative, though not conclusive, evidence of discrimination. *Sweeney*, ante, 604 F.2d at 113 & n.11. In this case, however, the evidence was far from compelling. Plaintiff skirts entirely the statistics for the actual tenure decisions. Of a total of 180 final decisions between 1960 and 1976, 146, or 81%, were granted tenure; 34 (19%) were not. Of the eleven minority candidates, including plaintiff, nine (82%) received tenure. Plaintiff gets no assistance from such figures.

Coming back to the beginning, and applying the clearly erroneous test, whether we scrutinize for individual error, or look at the court's opinion in the large, we find plaintiff has failed to meet his burden.

Affirmed.

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

(Not for publication)

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

DIBYENDU K. BANERJUEE,

Plaintiff, Appellant,

v.

BOARD OF TRUSTEES OF SMITH COLLEGE et al.,

Defendants, Appellees.

ON PETITION FOR REHEARING

Before Coffin, Chief Judge,

and Aldrich, Circuit Judge.

Max D. Stern, with whom Stern & Shapiro was on brief for appellant.

William L. Patton, with whom John H. Mason, and Ropes & Gray were on brief, for appellees.

Jack Greenberg, Charles Stephen Ralston and Gail J. Wright, on brief for the NAACP Legal Defense and Educational Fund, Inc., amicus curiae.

Leroy D. Clark, General Counsel, Constance L. Dupre, Acting Associate General Counsel, Vincent Blackwood, Assistant General Counsel, and Joel M. Cohn, Attorney, on brief for the

Equal Employment Opportunity Commission, amicus curiae.

June 19, 1981

Per Curiam. The petition for rehearing and subsidiary motion are denied. The court has no question about the result; the only question is to what extent, if any, it should address the various contentions made. We will not comment upon plaintiff's citing the published recognition of one of the panel - to which we all subscribe - that it is a judge's duty to be aware of his personal preconceptions, except to say that we might hope that, on further thought, counsel may realize the seriousness, and breadth, of the charge that the failure to respond in specifics to an argument is an escapism. We hope we are never too busy to consider all contentions; we must also hope we can conscientiously decide how much we should openly state.

In the present instance all we care to express is a denial that to the extent that we have proceeded "without discussion" we have decided either new or important principles. The fact that the district court may have felt

that the T & P members set higher standards for the announced requirements than had some earlier members under different conditions did not establish that they were racially motivated. Plaintiff had a right to urge that it was a basis for an unfavorable inference; equally the court had a right not to draw it. Plaintiff was not prejudiced thereby in the proof he introduced; the areas of called-for accomplishment were not changed.* This is not a case like Kunda v. Muhlenberg College, E.D.Pa., 1978, 463 F.Supp. 294, aff'd 621 F. 2d 532, where the applicant was not informed of a technical requirement.

We consider that plaintiff has had a fair trial, and we deny the petition.

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* Plaintiff, in complaining of the defendant's excluding consideration of certain letters he had offered not only overlooks the distinction between opinions selected and solicited by the applicant and those otherwise obtained, but, more important, overlooks what defendant understood as the directives of the American Association of University Professors.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DIBYENDU K. BANERJEE, Plaintiff	)	
v.	)	CIVIL ACTION NO. 76-4370-K
BOARD OF TRUSTEES OF SMITH COLLEGE, et al., Defendants	)	

June 30, 1980
Memorandum of Decision

I. Background

This is an action under the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 e et seq., and under the Civil Rights Act of 1866, 42 U.S.C. § 1981, brought against Smith College and certain employees of Smith College for alleged acts of discrimination against plaintiff Dibyendu Banerjee on account of his race and national origin, in conjunction with the decision not to award plaintiff tenure in the English department at Smith College and to terminate his employment.

Plaintiff seeks reinstatement, back pay, and damages. In a memorandum filed after trial plaintiff states "that he assents to the dismissal of all defendants who are joined in their individual capacities." Plaintiff's Post Trial Memorandum, p. 17. In light of this statement, and because the court is aware of no basis in fact or in law for holding the individual defendants liable under 42 U.S.C. § 2000e et seq. or 42 U.S.C. § 1981, this action is dismissed as to defendants Vernon J. Harward, Jr., Frank H. Ellis, Harold Skulsky, Joan Bramwell, Edith Kern, Thomas C. Mendenhall, Margaret C. Waggoner, Vernon Gotwals, and George W. Villafranca.[1] Remaining as defendants are the Board of Trustees of Smith College, Dorothy N. Marshall, in her official capacity as chairperson of the Board of Trustees, and Jill K. Conway, in her official capacity as

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1. Deceased as of December 25, 1977.

president of Smith College. These three defendants will hereinafter be referred to collectively as defendant Smith College.

II. Structure of this Memorandum

Fed. R. Civ. P. 52(a) directs that the trial court, in all nonjury cases, "find the facts specifically and state separately its conclusions of law thereon ... ." The Rule also declares that "(i)f an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein." Rule 52(a) is generally understood as requiring the trial court to make far more detailed findings of fact than a jury is required to make when a case is submitted under Fed. R. Civ. P. 49(a), requiring "a jury to return only a special verdict in the form of a special written finding upon each issue of fact." The contrast is sometimes expressed as one between findings on the "ultimate issues" ordinarily submitted to a jury and "subsidiary issues" on which a

trial court is expected to make findings, along with its findings on the ultimate issues. See Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106, 109, n. 2 (1st Cir. 1979) (hereinafter "Sweeney"). These subsidiary findings disclose the reasoning process as well as the ultimate finding of the fact-finder.

The subsidiary findings tend to be findings of pure fact and usually are exclusively so. They are, for example, findings as to what was said and done, and when and in whose presence. The kinds of questions that a jury must answer in a special verdict (which are also among the questions on which the court in a nonjury trial must make findings) are, in contrast, often evaluative conclusions reached by applying a legal standard, defined by applicable law, to the facts as determined in the findings of pure fact. Inevitably there is risk that findings on mixed questions

of fact and law will be infected by legal error in the conception of the legal standards explicitly or implicitly applied. Cases involving claims of discrimination are among those in which such a risk arises, as the Court of Appeals for the First Circuit has observed in the context of a claim of sex discrimination. Id. This Memorandum of Decision includes (1) a statement of the basis for subject matter jurisdiction (Part III); (2) a statement of the applicable law (Part IV); (3) subsidiary findings of fact, including (a) an appendix containing full subsidiary findings of fact and (b) a summary of those findings in the form of a chronology of significant events (part V); and (4) evaluative findings (on mixed questions of law and fact) (Part VI). The court proceeds in this way in the hope, first, of achieving greater clarity of statement than might otherwise occur and, second, of thus exposing for more explicit scrutiny all questions regarding the extent to which

evaluative findings (mixed questions of fact and law) are affected by legal conclusions defining the standards applied.

III. Jurisdiction

This court has subject matter jurisdiction over the claims asserted in this case under 28 U.S.C. §§ 1331(a) and 1343(4) and 42 U.S.C. § 2000e-5(f)(3).[2]

---

2. These statutes provide in relevant part as follows:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States ...

28 U.S.C. § 1331(a);

> Each United States district court ... shall have jurisdiction of actions brought under this subchapter (42 U.S.C. §§ 2000e to 2000-17).

42 U.S.C. § 2000e-5(f)(3):

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> ...
>
> (4) To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. § 1343.

IV. Applicable Law

A. The Title VII Claim

42 U.S.C. § 2000e-2(a) provides in relevant part as follows:

> It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

In its answer to plaintiff's complaint Smith College admits that it is an employer subject to Title VII.

"The central focus of the inquiry in a (Title VII disparate treatment) case such as this is always whether the employer is treating

'some people less favorably than others because of their race, color, religion, sex, or national origin.'" Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), quoting Teamsters v. United States, 431 U.S. 324, 335, n. 15 (1977). Here, "the issue is not whether (plaintiff) was qualified for (tenure) or should have been (granted tenure during the years in question) by some objective measure, but whether (he) was denied (tenure) because (he was not white and was not of European descent)." Sweeney, supra, citing Loeb v. Textron, Inc., 600 F. 2d 1003 (1st Cir. 1979). Another way of stating the issue is whether plaintiff would have been granted tenure "had (he) been evaluated against the standard that was applied generally to (whites or persons of European descent)." Sweeney, supra, 604 F. 2d at 114. Plaintiff must prove that his race or national origin was a determinative factor in the decision not to grant him tenure (or in the decision to terminate him) in the sense

that he would have been granted tenure (or would not have been terminated) but for his race or national origin. Goldman v. Sears, Roebuck & Co., 607 F.2d 1014 (1st Cir. 1976); Sweeney, supra; Fisher v. Flynn, 598 F.2d 663 (1st Cir. 1979).

One way a plaintiff may establish a violation of Title VII is through presentation of direct evidence of discrimination. Loeb, supra (age discrimination). In a tenure case, such evidence may consist, for example, of proof that the votes of specific members of the decisionmaking body were influenced adversely by plaintiff's race or national origin. In this context, an issue of potentially critical importance is the relationship between the Title VII causation requirement - the requirement that plaintiff show that his race or national origin was a determinative factor in the negative employment decision - and the particular steps in the tenure-decisionmaking process. Clearly, plaintiff would have made out his case if he had been able to show

that a specified number of members of the Tenure and Promotions Committee voted adversely to him, that a determinative factor in their decisions to vote adversely was plaintiff's race or national origin, and that had they voted affirmatively plaintiff would have been granted tenure. The causation inference becomes much more attenuated, however, when the focus of inquiry shifts from members of the Tenure and Promotions Committee (a College committee) to members of the English department. The precise contours of the relationship among the Title VII causation requirement, the tenure-decisionmaking process at Smith College, and proof of plaintiff's claim by direct evidence are by nature mixed questions of fact and law to be addressed if essential to the court's decision, as a part of the evaluative findings.

A second way a plaintiff may establish a violation of Title VII is by evidence that is wholly or partly circumstantial rather than

direct. The principal, though surely not the exclusive, route of proof through circumstantial evidence is identified in the analytic framework developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and its progeny. That framework requires the plaintiff in a Title VII disparate treatment case to carry the initial burden of establishing a prima facie case of discrimination. If he successfully does so, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the action complained of. If the employer carriers this burden, the plaintiff must then show that the articulated reason is the pretext for forbidden discrimination. Id.; Furnco, supra; Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978). At least in the First Circuit, trial courts are required to evaluate the evidence in the light of this framework. Blizard v. Fielding, 572 F.2d 13 (1st Cir. 1978).

In McDonnell Douglas the Supreme Court indicated that a Title VII plaintiff could establish a prima facie case of racial discrimination by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected, and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802. In a footnote the Court noted that "(t)he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802, n. 13. The flexible nature of the elements necessary to make a McDonnell Douglas prima facie showing was reiterated in Furnco, when the court stated that the McDonnell Douglas formulation "was not intended to be an inflexible rule" and that "(t)he method suggested in McDonnell Douglas ... was

never intended to be rigid, mechanized, or ritualistic." 438 U.S. at 575, 577. Furnco further indicated the nature and purpose of the prima facie showing:

> A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration or impermissible factors. See Teamsters v. United States (431 U.S. 324) at 358 n. 44. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.

438 U.S. at 577. In commenting upon the elements of the prima facie showing set forth in McDonnell Douglas and elaborated in Furnco, the Court of Appeals for the First Circuit has noted:

> In view of the fact that the Court has passed on the viability of the particular

> elements of the McDonnell Douglas prima facie case outside the factory hiring setting, we caution against automatic reliance on those elements when the employment setting is such that their proof does not make discrimination a probability. For example, if a qualified black were turned down for a job for which there were 100 applicants for every opening and the practice, rather than being to hire the first qualified applicant who appeared, was to choose on the basis of qualifications, recommendations and subjective impressions gleaned from an interview, it would hardly seem "more likely than not" that the applicant was rejected because of race.

Loeb, supra, 600 F.2d at 1017, n. 18.

A threshold problem in the case at bar, then, is how properly to formulate the elements of a McDonnell Douglas prima facie case in the context of a claim of discrimination in the denial of tenure. The parties agree as to the definition of three of the elements:

(1) that plaintiff is a member of a racial or national origin minority;

(2) that plaintiff was a candidate for tenure and was qualified under Smith

College standards, practices, or customs; and

(3) that despite his qualifications plaintiff was rejected.

The parties disagree with respect to what the fourth and final element of plaintiff's McDonnell Douglas prima facie case should be. Plaintiff asserts that the fourth element is "that after his rejection (i) Smith College continued to tenure white (non-minority) persons in plaintiff's department; or (ii) Smith College continued to employ others to perform the functions plaintiff was qualified to and did perform and could reasonably be expected to have similar needs for the length of plaintiff's proposed tenure." Plaintiff's Trial Memorandum, p. 6. Defendant asserts that as the fourth element "plaintiff must prove that at or near the time of his rejection, Smith granted tenure to white persons in plaintiff's department who were no more qualified than plaintiff for such an award."

Defendant's Trial Brief, p. 8.[3]

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3. Some courts have imposed an additional requirement of the existence of procedural irregularity in the tenure consideration process. E.g., Huang v. College of the Holy Cross, 436 F. Supp. 639, 653 (D. Mass. 1977) ("the burden on the plaintiff is to prove: (i) that he belongs to a racial minority; (ii) that the procedure followed by the College in his case was irregular; (iii) that he was at least as qualified in accordance with the College's own standards as other candidates who did receive tenure that same year; and (iv) that he was a candidate for tenure and despite his qualifications he was denied it"); cf. Kunda v. Muhlenberg College, ___F.2d ___, 22 F.E.P. Cases 62, 72 (3d Cir., Feb. 19, 1980) (sex discrimination) (disapproving district court's imposition of "additional requirement" of showing significant procedural irregularity or, alternatively, that males with similar qualifications were granted tenure during period when plaintiff was being considered, but noting that existence of procedural irregularity was relevent to question of intent and that granting of tenure to comparable males "is already part of the required Title VII case, since it fits within the fourth McDonnell Douglas factor paraphrased for this situation to require a showing that there were tenure positions open and the employer continued to grant tenure to comparable male members").

How the elements of the prima facie case should be framed depends in part on how the term "prima facie" is being used. There are at least two contrasting general senses in which the term "prima facie" showing is used: (1) proof of facts sufficient to permit a finder of fact to find in favor of the plaintiff; (2) proof of facts not only sufficient for this purpose but compelling such a finding in the absence of production by the defendant or rebutting evidence. See Black's Law Dictionary (5th ed. 1979). It may be argued that it is not entirely clear how the Supreme Court is using the term in the context of the McDonnell Douglas type of analysis. From some statements it might be inferred that "prima facie" showing is being used in the first sense - that is, to mean proof of facts sufficient to permit a finder of fact to find in favor of the plaintiff, but not sufficient to compel that finding even if the defendant offers no rebuttal or explanation.

The following passage from Furnco appears to be consistent with this first sense of "prima facie" showing:

> McDonnell Douglas did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under the Act."

438 U.S. at 576 (emphasis added). If this is the intended meaning of "prima facie" showing in the McDonnell Douglas framework for analysis, that framework is in essence an aid to common sense weighing of inferences from circumstantial evidence of discrimination.

If, instead, a "prima facie" showing is taken to mean evidence that compels rather than merely permits a finding in favor of plaintiff in the absence of explanation, a very different structure for decisionmaking

is created.[4] It is then necessary to consider whether the plaintiff, in order to make a "prima facie" showing, in this compelling sense, must offer proof of such convincing quality that a factfinder, applying common sense methods of factfinding by circumstantial evidence, could not reasonably find against the plaintiff. If so, the legal consequence of the "prima facie" showing is extraordinarily favorable

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4. There may also be a theoretical distinction among the inference processes behind this type of prima facie case. On the one hand, a finding for the plaintiff may be compelled in the absence of rebuttal because the elements of the prima facie case, standing alone, are such that the factfinder could not reasonably find against the plaintiff in the absence of additional evidence. On the other hand, a finding for the plaintiff may be compelled in the absence of rebuttal not because of an inference to be drawn from the elements of the prima facie showing alone but because of an inference to be drawn from the conjunction of the elements of the prima facie showing and the lack of rebuttal.

to the plaintiff, but the difficulty of making that showing is so great that it could seldom be made.

In addition to the issue as to whether "prima facie" showing is used in the sense of proof that compels or instead in the sense of proof that permits a finding for the plaintiff when not rebutted, a second question arises. Is the legal consequence of a "prima facie" showing within the McDonnell Douglas framework merely a shifting of the burden of production (either of evidence, or of analysis)?[5] Or has the

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5. One may be skeptical that it is a burden of production of evidence, since this framework is often applied after both parties have developed the evidence fully. See Loeb, supra, 600 F.2d at 1016 ("McDonnell Douglas is to a large extent an analytical framework enunciated post hoc, in light of a given set of facts, to give judges a method of organizing evidence and assigning the burdens of production and persuasion in a discrimination case"); Blizard v. Frechette, 601 F.2d 1217 (1st Cir. 1979) (rejecting argument that McDonnell Douglas requires not just a method of analysis but also a method of receiving and responding to proof at trial). Is the burden, then, to be viewed as a burden of analysis-a burden of developing arguments in a structural way - in contrast with the burdens of production that, in a jury trial may lead to a directed verdict when the defendant fails to meet his burden?

Supreme Court chosen in this instance to create a legal doctrine that has ongoing consequences even after it is determined that the defendant has met the burden of showing nondiscriminatory reasons for its action? That is, has the Court fashioned not merely an aid to weighing of evidence but instead a doctrine that places on the scales of justice an added weight in plaintiff's favor - giving to the evidence that makes up the "prima facie" showing not merely the weight it has in supporting inferences that might ordinarily be drawn by a factfinder but also an added weight in the plaintiff's favor because it constitutes such a "prima facie" showing?[6]

There are statements in Furnco that might be interpreted as an indication that

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6. An analogous question has arisen with respect to the effect of an application of the doctrine of res ipsa loquitur. See Prosser, Torts § 40 (1971).

the prima facie showing carries some added weight. For example, the Court stated, "(a) prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." 438 U.S. at 579. Since "presume" and "presumption" are sometimes used in a special sense that contrasts with "infer" and "inference," this passage might be interpreted as placing on the scales in plaintiff's favor the added weight of a special legal doctrine. But other passages in Furnco appear to support more strongly an interpretation that the McDonnell Douglas framework for analysis is aimed instead at developing a method and structure of analysis that will aid factfinders in making certain that they do not overlook methods of reasoning that tend to support circumstantial inferences of discrimination in cases in which direct evidence is inherently unlikely to be available.

The following passage, and the passage quoted on page 9, supra, are examples:

> A McDonnell Douglas prima facie showing is not the equivalent of a factual finding of discrimination, however. Rather, it is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations.

438 U.S. at 579-580. Moreover, the Court of Appeals for the First Circuit has indicated that "(T)he inference of discrimination created by the prima facie case is dispelled once the employer's reason is stated, until and unless the latter is shown to be a pretext ..." Loeb, supra, 600 F.2d at 1015.[7]

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7. In a footnote to this passage the Court added:

> Although the Supreme Court has never discussed explicitly the significance of the prima facie case after the employer articulates a legitimate reason, we may assume that the evidence used to establish the prima facie case remains relevant, and can help sustain a verdict for the plaintiff if the employer's reason is discredited, but that any other evidence bearing on motive should also be considered. See Furnco, 438 U.S. at 580, 98 S.Ct. 2943.

600 F.2d at 1015, n. 14.

Read together and in context, the decisions of the Supreme Court in McDonnell Douglas and Furnco, and the decisions of the First Circuit in Loeb, Sweeney and Blizard, support the conclusion that a "prima facie" showing is made when the plaintiff produces evidence sufficient to support, though not compelling, a finding of discrimination in the absence of rebuttal or explanation. They also support the conclusion that the prima facie showing once rebutted continues to be relevant and is entitled to the weight it ordinarily would have in supporting inferences drawn by a factfinder, but not any rigid or ritualistic additional weight.

With this definition of prima facie in mind, the court concludes that the elements of a prima facie showing for the case at bar consist of proof of the following elements:

(1) that plaintiff is a member of a racial or national origin minority;

(2) that plaintiff was a candidate for tenure and was qualified under Smith College standards, practices or customs;

(3) that despite his qualification plaintiff was rejected; and

(4) that tenure positions in the Department of English at Smith College were open at the time plaintiff was denied tenure, in the sense that others were granted tenure in the department during a period relatively near to the time plaintiff was denied tenure.

With respect to the second element, plaintiff need show only that he was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made. That is, he need only show that his qualifications were at least sufficient to place him in the middle group of tenure candidates as to whom both a decision granting tenure and a decision denying tenure could be justified as a

reasonable exercise of discretion by the tenure-decisionmaking body. Qualifications of other candidates for tenure considered within a period relatively near to the time plaintiff was considered are relevant to this second element of plaintiff's prima facie case to the extent that they help define this group.

With respect to the fourth element, plaintiff need not make any showing regarding the qualifications of persons granted tenure. Their qualifications are more appropriately considered as part of the employer's rebuttal of the prima facie case or as part of plaintiff's showing of pretext.

B. The Claim Under 42 U.S.C. § 1981

42 U.S.C. § 1981 provides in relevant part as follows:

> All persons within the jurisdiction of the United States shall have the same right ... to make and enforce contracts ... as in enjoyed by white citizens.

Section 1981 has been held to prohibit

discrimination in private employment on the basis of race. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976); Johnson v. Railway Express Agency, 421 U.S. 454 (1975). As a general proposition, § 1981 and Title VII are not coextensive in their coverage. Johnson, supra. In this case, however, the same factual predicate is alleged to constitute a violation of Title VII. The primary difference of potential significance at this juncture is the scope of available relief.[8] Accordingly, for

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8. "An individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages. ... And a backpay award under § 1981 is not restricted to the two years specified for backpay recovery under Title VII." Johnson, supra, 421 U.S. at 460. On the other hand, 42 U.S.C. § 2000e-5(g) provides in relevant part as follows:

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint

8. (Cont.)

> the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.

See DeGrace v. Rumsfeld, 614 F. 2d 796, 808 (1st Cir. 1980.)

the purpose of determining liability in this case, the court may treat plaintiff's § 1981 claim and Title VII claim as coextensive.

V. Subsidiary Findings of Fact

In a separate document, full subsidiary findings of fact are being filed in this case, at the time this Memorandum of Decision is released. This Part V summarizes those findings in the form of a chronology of significant events.

CHRONOLOGY OF SIGNIFICANT EVENTS

DATE	EVENT
3-15-66	Banerjee appointed Lecturer in Department of English (the "Department") at Smith for the period of 2 years to commence 7-1-66, teaching duties to begin 9-66.
3-8-68	Banerjee's appointment renewed for additional 2-year period, Department unanimously recommending renewal.
3-16-70	Banerjee reappointed for another 2-year period.

9-22-70	Banerjee's rank changed from Lecturer to Assistant Professor as result of completing requirements for Ph.D.
Fall 1971	Professor Petersson discusses with Banerjee options available to him for timing of tenure decision. Banerjee opts for decision in 1971-1972 academic year.
11-29-71	Department votes 5-3 in favor of recommending Banerjee for tenure.
11-30-71	Professor Connelly notifies Banerjee in writing that by divided vote Department has voted to recommend Banerjee for tenure.
12-8-71	Professor Connelly transmits vote in writing to President Mendenhall as part of letter regarding Department budget for following year.
12-71; 1,2-72	Members of Department voting on Banerjee's case write confidential letters to Committee on Tenure and Promotions ("T & P") explaining their votes.
1-31-72	T & P first considers Banerjee's case and decides to meet with Department on 2-19-72.
2-6-72	Professor Skulsky writes his letter to T & P indicating that although he had voted in favor or recommending Banerjee for tenure at meeting of Department in 11-71,

his reasons for doing so had not concerned merits of case and he had since concluded that these reasons were erroneous.

2-19-72 — T & P meets with Department concerning Banerjee's case. Department members formally notified for first time of Professor Skulsky's changed vote. After Department members leave T & P decides to obtain and read various poems written by Banerjee.

3-3-72 — T & P votes 4-1 against recommending Banerjee for tenure, with one abstention.

3-7-72 — Abstaining T & P member submits motion for reconsideration of Banerjee's case.

3-15-72 — T & P votes 4-0, with two abstentions, in favor of allowing abstaining member's motion for reconsideration. After further discussion of Banerjee's case, Professor Dimock moves that Banerjee be recommended for tenure. Motion fails for lack of second.

3-24-72 — President Mendenhall writes Banerjee informing him of adverse decision by T & P and that his present appointment would be his last.

Spring 1972 — Professor Petersson tells Banerjee that he believes xenophobia was involved in negative decision on tenure.

2-22-73 — Banerjee makes written request to T & P for reconsideration.

3-3,8,12-73 T & P considers Banerjee's request for reconsideration.

3-29-73 President Mendenhall replies for T & P rejecting Banerjee's petition for reconsideration.

4-21-73 Banerjee and his wife meet with President Mendenhall to object to 3-29 letter. Mendenhall suggests Banerjee take his case to about-to-be-constituted Grievance Committee. Banerjee rejects suggestion.

4-23-73 Banerjee writes Mendenhall a memorandum detailing his objections.

4-26-73 Mendenhall replies to Banerjee's memorandum, again suggesting he take his case to Grievance Committee.

4-29-73 Banerjee writes letter rejecting Grievance Committee idea and requesting that matter be placed before Trustees at their next meeting, on 5-5-73.

5-3-73 President Mendenhall writes letter presenting matter to Trustees.

5-5-73 Trustees by resolution decline to act favorable to Banerjee.

5-7-73 President Mendenhall writes letter informing Banerjee of Trustees' action.

5-73 Grievance Committee established to investigate and consider alleged violations of Faculty Code.

6-28-73 Banerjee submits written grievance to Grievance Committee.

1-10-74 Grievance Committee votes on its decision on Banerjee's case.

1-28-74 Grievance Committee issues findings on Banerjee's case.

1-29-74 President Mendenhall telephones offices of AAUP in Washington, D.C. for advice on procedure to be used in reconsidering Banerjee's tenure case.

2-5-74 T & P unanimously votes to accept report of Grievance Committee, to comply with its recommendations, and to follow President Mendenhall's proposals for procedure to be followed in reconsidering Banerjee's tenure case.

2-6-74 President Mendenhall writes to Chair of Grievance Committee notifying him of T & P's decision and asking to be notified if Grievance Committee disagrees with any of procedures T & P proposed to follow.

2-10-74 Department votes 7-4 against recommending Banerjee for tenure, with one abstention.

2-12-74 Professor Pickrel sends letter to President Mendenhall as Chair of T & P reporting new vote, copies of this letter also being sent to Banerjee in India and in care of his father-in-law in Canada.

President Mendenhall writes Banerjee informing him for first time of procedure adopted for reconsideration and that he would notify Banerjee as soon as T & P had completed its review.

2-25-74 — Banerjee cables Mendenhall from Rome: "Postpone Tenure Consideration Until Return Question Procedure."

2,3,4-74 — Members of Department except Professor Young send confidential letters to President Mendenhall explaining their votes.

3-5-74 — Banerjee sends letter to President Mendenhall questioning reconsideration procedure, submitting articles for consideration by T & P, and indicating people he had asked to write to T & P on his behalf.

3-8-74 — President Mendenhall replies on behalf of T & P to Banerjee's letter of 3-5-74.

3-11-74 — Banerjee writes letter responding to Mendenhall's letter of 3-8-74.

4-16-74 — President Mendenhall receives letter from Professor Petersson explaining Petersson's positive vote on reconsideration and questioning reconsideration peocedure.

4-18-74 — T & P discussed Professor Petersson's letter and decides to seek advice on counsel and written confirmation of AAUP advice.

4-24-74 President Mendenhall writes to AAUP seeking confirmation of advice concerning reconsideration procedure.

4-25-74 President Mendenhall writes letter to Professor Petersson responding to Petersson's letter of 4-16-74, explaining reasons for procedure employed and asking for explanation of reference to missing documents in 4-16-74 letter.

5-2-74 AAUP confirms advice regarding reconsideration procedure.

5-7-74 In response to question raised by Banerjee in his letter of 3-11-74, President Mendenhall sends memorandum to all members of Department participating in reconsideration asking them to review official copy of Banerjee's doctoral thesis.

5-9-74 T & P decides that when members of Department read correct copy of thesis they should also read copies of various poems submitted by Banerjee to T & P during original consideration of his case.

5-11-74 Professor Petersson sends President Mendenhall a letter in response to Mendenhall's letter of 4-25-74, explaining that missing documents referred to in letter were reports on Banerjee's teaching prepared by Professor Ellis (a duplicate of which had been found) and himself (no duplicate).

5-13-74 Professor Pickrel distributes copies of poems to voting members of the Department.

5-14-74 Professor Van Voris requests President Mendenhall to have T & P also distribute to Department copies of letters from outsiders written in preceding months in support of Banerjee.

5-15-74 Banerjee meets with President Mendenhall to discuss reconsideration of his tenure case.

5-16-74 President Mendenhall writes letter on behalf of T & P to Professor Van Voris, declining his request.

5-20-74 Department votes 6-4 against recommending tenure for Banerjee.

Professor Pickrel writes letter to President Mendenhall reporting the vote.

5-20,21-74 Voting members of Department write letters to President Mendenhall explaining their votes.

5-23-74 Professor Pickrel sends letter to Banerjee reporting Department vote.

Department meets with T & P to discuss Banerjee's case. After Department leaves T & P again agrees not to consider letters on Banerjee's behalf received from outsiders during early 1974.

5-27-74 T & P decides not to request or allow Banerjee to make personal appearance before it and reaffirms decision not to consider letters from outsiders received during preceding months.

5-29-74	T & P unanimously votes to accept Department recommendation against tenure for Banerjee.
6-1-74	President Mendenhall, on behalf of T & P, notifies Banerjee in writing of decision by T & P against tenure.
7-22-74	Banerjee files complaints against Smith with EEOC and MCAD.
9-17-76	EEOC issues right-to-sue letter.
12-9-76	Banerjee commences present action in this court.

VI. Evaluative Findings

The closest thing to direct evidence of racial or national origin discrimination against plaintiff offered at trial was the testimony concerning Professor Petersson's statement at the time of the initial consideration of plaintiff's tenure case to the effect that Professor Petersson thought that xenophobia was involved in the negative decision. However, the court credits Professor Petersson's testimony at trial that he was using the term to refer not to any racial or national origin prejudice but rather to the tendency of some members of the English Department to be oriented restrictively to English literature rather then being open to the values of comparative literature. It would be a gross distortion of the perceptive and reflective views of Professor Petersson, empathetic as they were to plaintiff, to treat his 1972 statement as proof of discrimination

based on race or national origin when his testimony at trial which the court credits, explains his correct usage of the term xenophobia in a way that is not synonymous with, and in fact is contrary to, the decision in plaintiff's case having been based on racial or national origin discrimination.

Plaintiff has made out a prima facie case of discrimination on the basis of race or national origin, as defined in Part IV, supra. Plaintiff has shown: (1) that he is a member of a racial or national origin minority (Bengali); (2) that he was a candidate for tenure at Smith College and was qualified under Smith College standards, practices, or customs, in the sense that he was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made; (3) that despite his qualifications he was rejected; and (4) that tenure positions in the English Department at Smith were open at the time plaintiff was denied

tenure, in the sense that others were granted tenure in the department during a period relatively near to the time plaintiff was denied tenure.

The reason articulated by Smith for the denial of tenure was as follows:

> Plaintiff was denied tenure because he did not receive the requisite number of votes from members of the Committee on Tenure and Promotion of Smith College. Since the vote of the Committee was a group decision, no single reason or set of reasons can be provided as to why the Committee voted as it did. In general the Committee determined, based on all of the materials that were available to it, that the breadth and depth of the plaintiff's scholarship, considered in conjunction with the quality of his teaching and his service to the college, did not in the Committee's best judgment warrant an award of tenure. ...

This reason is facially valid, in the sense that it accurately describes the procedural reason plaintiff was denied tenure ("he did not receive the requisite number of votes from members of the Committee on Tenure and Promotion")and the basis for the

decision ("the Committee determined, based on all of the materials that were available to it, that the breadth and depth of the plaintiff's scholarship, considered in conjunction with the quality of his teaching and his service to the college, did not in the Committee's best judgment warrant an award of tenure").

Plaintiff has not established that this reason was a pretext for racial or national origin discrimination. Plaintiff's case was not such that only a decision for tenure could be supported, nor was it a case in which only a decision against tenure could be supported. Rather, on the basis of the material before it, T & P reasonably could have decided for or against tenure. Plaintiff has not demonstrated that any member of T & P who voted on his case, either at the initial consideration or at the reconsideration, voted against him because of plaintiff's race or national origin. Nor has plaintiff established that any members

of the English Department voting on his case, either initially or upon reconsideration, voted adversely to plaintiff on account of his race or national origin. The evidence shows a closely divided Department the members of which had conflicting views regarding plaintiff's value to the Department. As revealed by their letters to T & P, those voting to recommend tenure for plaintiff tended to focus on plaintiff's value to the Department as a comparativist, while those voting against recommending tenure for plaintiff tended to focus on perceived deficiencies in plaintiff's scholarship, in particular on the quantity and stylistic qualities of his writing. As revealed by the evidence at trial, both these positions were reasonable.

Plaintiff would have been valuable to the emerging comparative literature program, but the program could have, and in fact did, flourish without him. The quantity of plaintiff's scholarship was not impressive, whether judged

at the time of the original consideration or instead judged after taking account of additional works completed or in progress by the time of the reconsideration. It was sharply disputed whether the quality of his writing should be regarded as a negative factor. It is not the function of a court, in these circumstances, to substitute its judgment of the quality of scholarship for the formally expressed judgment of the tenure-decisionmaking body of the college. The expert testimony offered at trial is useful to the court in showing that the quality of the scholarship is neither so poor no so distinguished that the tenure-decisionmaking body could reasonably decide only one way.

In the circumstances of this case, the college could reasonably conclude that plaintiff's writing is not distinguished in quality or quantity, but that does not end the inquiry. Absence of distinction in scholarhip did not set plaintiff entirely apart from some

of the other members of the English Department. Plaintiff may well have been measured against a more rigorous standard for tenure than some of his more senior former colleagues in the English Department. The emphasis placed on objections to his scholarly writing by members of the Department who voted against him manifested a more demanding standard than had been applied in previous years. In this sense, he was subjected to differential treatment in comparison with some of the persons who had been granted tenure in years previous to the years in which he was considered for tenure. This kind of differential treatment, however, does not entitle plaintiff to prevail. He must show that he was subjected to a different standard <u>because of</u> his race or national origin. The court concludes that the differential treatment of plaintiff as compared to some of his more senior former colleagues in the English Department was not the result of discrimination against plaintiff on account of

his race or national origin; rather, it was a result of increased competition for tenure positions - variously described as "the new professional situation" the college found itself facing in the early 1970s with respect to candidates for tenure and the "golden moment for strengthening the faculty."

Nor does the evidence support the conclusion that plaintiff was treated any differently from any of his immediate peer group of English Department tenure candidates. Although the Grievance Committee found that procedural irregularities existed in the manner in which plaintiff's case was originally handled by the English Department, it also found that the irregularities "did not occur because their perpetrators acted in bad faith." The court credits these findings and reaches the same conclusions. The primary irregularity - "the central question" in the language of the Grievance Committee report - was Professor Skulsky's change of vote in his letter to

T & P. Skulsky's letter to T & P regarding plaintiff (Exhibit 40) is a detailed, thorough, and thoughtful evaluation of plaintiff's case. The court concludes that the reasons it advances for voting against a recommendation of tenure for plaintiff were not pretexts for racial or national origin discrimination. Nor will the evidence support a conclusion that Skulsky changed his vote in order to deprive plaintiff of the opportunity of making a fuller submission to T & P or of depriving plaintiff's supporters from marshaling support for him by lulling them into thinking that plaintiff had the recommendation of his department. Plaintiff did not know at the time his case was first considered by the English Department whether he would or would not have their recommendation. It is to be expected that the case he presented to the Department originally was the best he could present. The method of reconsidering plaintiff's case, though subject to criticism, was nevertheless a permissible resolution of

a problem for which no perfect solution was available. There has been no showing that the reconsideration was structured as it was in order to deny plaintiff tenure, much less in order to deny him tenure on account of his race or national origin.

Plaintiff's argument that even if not granted tenure he should have been awarded a long-term contract is without merit. The evidence shows that such contracts were used only in special circumstances, not existing in plaintiff's case, and that in any event Smith was endeavoring during the period of consideration of plaintiff's case to do away with such contracts wherever feasible. Plaintiff has made no showing that he was treated differently from any comparable member of the junior faculty with respect to such long-term nontenure contracts, much less has he made a showing that he was treated differently because of his race or national origin.

VI. Conclusion

For the foregoing reasons, judgment will be entered for defendants.

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DIBYENDU K. BANERJEE, Plaintiff	)	
	)	CIVIL ACTION
v.	)	NO. 76-4370-K
BOARD OF TRUSTEES OF SMITH COLLEGE, et al., Defendants	)	

June 30, 1980
Subsidiary Findings of Fact

Plaintiff Dibyendu K. Banerjee is a naturalized citizen of the United States who resides in Northampton, Massachusetts. Plaintiff was born in Calcutta, India. His ancestors are Indian, specifically Bengali, and he is visibly non-white. Plaintiff has a Ph.D. in Comparative Literature, with concentration in English, French, and Italian, from Harvard University. Plaintiff completed his doctoral dissertation, "T.S. Eliot and Dante," in 1970 and was awarded the Ph.D. in 1971.

Defendant Smith College is a private, four-year liberal arts educational institution

for women located in Northampton, Massachusetts. Defendant Dorothy N. Marshall was chairperson of the Board of Trustees of Smith College in December, 1976. Defendant Jill K. Conway is President of Smith College. Defendants Marshall and Conway are sued in their official capacities.

Thomas C. Mendenhall was President of Smith College from July, 1959 until June, 1975. Vernon Harward, Frank Ellis, Harold Skulsky, Joan Bramwell, Kenneth Connelly, Robert Petersson, Paul Pickrel, Richard Young, Frank Murphy, William Van Voris, Elizabeth Von Klemperer, Edith Kern, and Margaret Shook are professors in the English Department at Smith College. George Dimock, Peter Roe, Vernon Gotwals, Margaret Waggoner, and George De Villafranca taught at Smith College and were members of the Tenure and Promotions Committee at the time plaintiff's tenure case was originally considered, as were Professor Harward of the English Department and President Mendenhall. Nelly Hoyt, Cecelia

Kenyon, and Elizabeth Horner were professors at Smith College and members of the Tenure and Promotions Committee at the time of reconsideration of plaintiff's tenure case, as were Dean Alice Dickinson, Professors Gotwals and Harward, and President Mendenhall.

In the Spring of 1965 plaintiff visited Smith College to explore the possibility of his being employed in the English Department at Smith. At the time, plaintiff's wife, Maria Banerjee, was employed in the Department of Russian Language and Literature at Smith as a temporary replacement for a professor then on sabbatical. On March 15, 1966, plaintiff received a formal appointment to the position of Lecturer in the Department of English at Smith for a period of two years to begin on July 1, 1966, teaching duties to commence in September, 1966. At about the same time, plaintiff's wife was offered a position as Assistant Professor in the Department of Russian Language and Literature at Smith,

which she accepted.

On March 8, 1968, plaintiff's appointment was renewed for an additional two-year period, the Department of English unanimously recommending this renewal.

On March 16, 1970, plaintiff was again reappointed to the position of Lecturer for an additional two-year period. On September 22, 1970, as a result of plaintiff's having completed the requirements for his Ph.D., his rank was changed from Lecturer to Assistant Professor.

In the fall of 1971 Professor Petersson, then chairman of the Appointments Committee of the English Department, met with plaintiff to discuss the timing of the tenure decision in plaintiff's case. The Faculty Code did not precisely specify how to count plaintiff's years as Lecturer and therefore did not specify during what year plaintiff should be considered. The normal practice was to treat persons initially appointed as Lecturers as

as though they had initially been appointed as Assistant Professors and, accordingly to have the Committee on Tenure and Promotion ("T & P") consider them for tenure in the spring of their fifth full year of continuous service at Smith. Professor Petersson told plaintiff he could be considered for tenure during 1971-1972 or, alternatively, he could if he so desired not count his years spent as Lecturer at all but instead have the five-year period of service before a tenure decision run from the time he was first appointed to Assistant Professor (Fall 1970). Plaintiff told Professor Petersson that he did not want to postpone the tenure decision but wanted to be considered for tenure during the 1971-1972 academic year.

Plaintiff was first considered for tenure at Smith in the academic year 1971-1972. An award of tenure at Smith constitutes appointment to the permanent faculty, and, as such, is effective to the recipient's normal

retirement age. In the academic year 1971-1972, the procedure by which junior faculty members were considered for tenure was set forth in the Code of Faculty Legislation and Administrative Practice (the "Code"). The Code provided that the procedure for such consideration should be as follows:

> Those permanent members of the department whose rank is higher than that of the candidate shall meet and determine whether or not the person shall be recommended by the department for appointment to the permanent staff. The vote shall be transmitted in writing to the Committee on Tenure and Promotion (which Committee should consist of the President of Smith, the Dean of the Faculty, and five professors elected by the Faculty-at-large for a term of five years). When the vote is not unanimous, each member of the department who is entitled to vote shall write a confidential letter to the Committee on Tenure and Promotion explaining his judgment. If the Committee on Tenure and Promotion recommends appointment to the permanent staff and the Board of Trustees so appoints, the decision shall be communicated in writing to the person affected who shall thereafter enjoy tenure of office subject to the conditions herein stated. If the candidate is not to be appointed to the permanent staff he shall be notified at the earliest possible moment.

On or about November 29, 1971, the members of the English Department who were eligible to vote on plaintiff's tenure case and who were not on sabbatical or absent from Smith for some other reason met and discussed whether plaintiff should be recommended for tenure. The Department voted 5-3 in favor of recommending tenure, Professors Connelly, Petersson, Pickrel, Young and Skulsky voting in favor of recommending tenure, Professors Bramwell, Ellis, and Harward voting against recommending tenure. Professor Skulsky stated that he was going to vote to recommend plaintiff for tenure because he was concerned about the possible adverse consequences to plaintiff if his employment at Smith were terminated and also because he had concluded that if a department were dubious about tenure in a particular candidate's case it should make a decision as early in the candidate's career as possible, and not make a reappointment which would bring the candidate to the tenure decision.

On November 30, 1971, Professor Connelly notified plaintiff in writing that by a divided vote the Department had voted in favor of recommending tenure. On December 8, 1971, Connelly transmitted the vote in writing to President Mendenhall as part of a letter regarding the English Department's budget for the following year. The matter was then before the Committee on Tenure and Promotion ("T & P").

Because the vote of the English Department regarding plaintiff's tenure candidacy had not been unanimous, the voting members of the department were required, under the Faculty Code, to write a confidential letter to T & P, explaining their votes.

In his letter to T & P, Professor Skulsky indicated that although he had voted in favor of recommending plaintiff for tenure at the meeting of the English Department, his reasons for doing so did not concern the merits of plaintiff's case and he had since concluded

that these reasons were erroneous. At the time Professor Skulsky wrote his letter to T & P, the Faculty Code did not prohibit professors from changing their votes between the departmental meeting on a candidate's case and the meeting of T & P on the case. The Code was silent on this matter and did not discuss it in any manner whatever. Changes of vote by members of a department had occurred in other tenure cases. For example, a change had occurred in the tenure case of Skulsky, considered two years before the consideration of plaintiff's case.

As a result of Skulsky's letter, T & P treated the Departmental vote as tied and treated plaintiff's case as if he had not been recommended by the Department.

The Faculty Code set forth three general criteria to be considered in awarding tenure: ability in teaching, scholarship, and personality. With respect to the first -- ability in teaching - most members of the

Department stated in their letters that they either highly regarded or did not question plaintiff's performance. Professor Connelly observed that "(t)he faculty reports on his teaching have been unusually complimentary and have recognized the subtlety, authority and fine rapport in his classes" (Exh. 38). Professor Young noted that "(e)veryone agrees, I think, that Mr. Banerjee is a very good teacher ..." (Exh. 37), and Professor Petersson was of the view that "(a)s a teacher, Mr. Banerjee is one of the most sought after members of our department" (Exh. 41). Professor Pickrel believed plaintiff to be a "good teacher" (Exh. 43), and Professor Harward, although he had not observed plaintiff's teaching, believed him to be "competent enough in that respect" (Exh. 42). Professor Skulsky did not comment on plaintiff's teaching (Exh. 40). Professor Bramwell disclaimed any knowledge of plaintiff's teaching and wrote

that she could not "... speak of this, except to remark that Mr. Banerjee has not been subjected to the usual rigors of departmental visitation until now" (Exh. 39). Professor Ellis, on the other hand, for reasons set forth in his letter, concluded that "... Mr. Banerjee is only a mediocre teacher" (Exh. 44).

With respect to scholarship, the members of the English Department who voted against plaintiff found him to be seriously deficient, and those who supported him did not praise him highly;

(a) Professor Ellis wrote in his letter that plaintiff's dissertation did not:

> ... give promise of future scholarship. Most of it is worked up from secondary sources; it is simply a rearrangement of what other people have already published. Much of it is no better then the writing of our honors students in English. Some of it is simply silly ...

(b) Professor Connelly wrote:

> Mr. Banerjee's articles on Rossetti, Pound and Eliot are perhaps not to

everyone's taste. I feel that very often the subjects themselves and the critical manner in which these poets tend to be discussed displeases some not friendly to modern criticism. But it doubtless means something that they are being published in Harvard's periodical Comparative Literature and in Modern Language Notes.

(c) Professor Harward wrote:

I have read his dissertation, however, and the articles adapted from it. The dissertation is admittedly on a difficult subject -- the influence of Dante upon T.S. Eliot -- but this fact cannot excuse what I find to be the very disappointing quality of his work. It is diffuse, frequently unclear, and sometimes faulty even in respect to usage. It was reported to the professorial group that one of his readers at Harvard urged Benerjee to modify the dissertation for publication. So be it. I myself simply could not have approved the dissertation as partially fulfilling requirements for the doctorate. It is significant that the essays he has adapted from the dissertation show minimal, if any, improvement over the original chapters.

(d) Professor Skulsky concluded that the weaknesses of plaintiff's scholarship, as revealed in his writings, were legion. Thus, he observed:

1) that the text of plaintiff's dissertation "is padded out ... with quotations thrown in haphazardly, without any effort to make their specific relevance clear ...," and with "recondite but purely decorative allusions usually reflecting some prevailing intellectual fashions";

2) that plaintiff's arguments often turned on unclear figures of speech or philosophical distinctions;

3) that plaintiff's use of primary sources was not always scrupulous enough;

4) that in one case plaintiff ventured to decide a controversial and complicated issue by selective reference to second hand authorities and without analyzing the primary source at all:

5) that plaintiff sometimes contradicted himself within the space of one of two paragraphs;

6) that plaintiff misused words; and

7) that the thesis contained elementary errors in grammar.

(e) Professor Bramwell wrote:

> The two articles and the thesis which were submitted appeared to me slight. The structure of the thesis was somewhat confused and its parts disproportionate. Mr. Banerjee mentions a large number of philosophers, critics and other writers, but rather indiscriminately and often to no particular purpose. A number of solecisms would suggest that his knowledge of other languages and literatures than English is not very deep. It was my impression that his thesis director ought to have served him better in shaping and pruning the work.

(f) Professor Young wrote:

> Most of our discussion, therefore, concerned his writing. The fact that some of his colleagues find it unimpressive does not seem to me to distinguish him much one way or the other. At any rate the editors of two eminent learned journals want to publish him.

(g) Professor Petersson's letter contains the following views:

> Mr. Banerjee's scholarly writing is more reticent and stiff than his other writings, and, for the reasons just mentioned, I don't believe it has come to full maturity. It is nevertheless solid and reputable, and is being published in some of the best scholarly journals. His present concern with Provencal poetry -- a vein of literature

just now being explored - give a promise of becoming a new and valuable book.

(h) Finally, Professor Pickrel wrote:

> When I turned to Mr. Banerjee's writing (I have read two articles accepted for publication in decidedly reputable journals and a portion of his doctoral dissertation) I was, I confess, disappointed. The precision and bite that mark his speech seemed to me to be lacking, and I did not find firmness of structure or a sure sense of scale. Sometimes the logic is faulty.

With respect to the third criterion for tenure, referred to as "personality," the letters reflect the following:

(a) Professor Pickrel expressed his reservations about plaintiff's "usefulness at the administrative tasks that plague every department" and Professor Petersson wrote:

> If I search for faults, I could say that Mr. Banerjee is not likely to become an effective administrator. On the other hand, he always responds when called upon, and always with characteristic willingness.

(b) Professor Bramwell's letter contained the following observation.

> Another consideration which seems to me very important at a time when we are looking carefully at the composition of the department is that Mr. Banerjee has played almost no part in the department's work. He has hardly ever attended a department meeting during the years he has been here, has never expressed an opinion on departmental matters, and has never had responsibility for any kind of organization within the department. I do not know whether he is even aware that such things are done by other people. We have no way of knowing whether he might be a valuable member of the department, or, indeed, of the Faculty, if he cared to, and it seems to me very unwise to continue to appoint someone who has had such a long time to assume a useful role and has not done so.

(c) Professor Harward also noted that in his view:

> Finally, we cannot anticipate that Banerjee would perform any significant administrative tasks. He demonstrated his incapacity in the year he directed the program in comparative literature. I think that by temperament he is not adapted for this kind of work. I make this point not because I regard this factor as essential for the granting of tenure or even of great importance, but because neither the Department nor the College could anticipate any compensatory service of this type from him.

(d) Finally, Professor Ellis wrote to the Committee on Tenure and Promotion as follows:

> 4. Mr. Banerjee's administrative skills. These were not discussed because they do not exist. The few things that Mr. Banerjee was given to do in the Department failed to get done. When he was asked to take over one of Mr. Murphy's duties (in Mr. Murphy's absence this semester), he simply passed it along to another member of the Department.

(e) Professors Connelly, Skulsky, and Young did not comment in their letters on plaintiff's performance of administrative tasks.

T & P first considered plaintiff's case at a meeting on January 31, 1972. At this time T & P decided to meet with the Department concerning the case on February 19. On February 19, T & P met with the Department. During this meeting the Department members learned that Skulsky had changed his vote. Professors Peterson, Young, and Connelly urged that plaintiff be granted tenure, citing

his abilities as a teacher and his wide range of experiences and knowledge of other languages and literatures. Other members of the Department, including Professors Harward, Ellis, Bramwell and Skulsky opposed granting tenure to plaintiff, principally citing the poor quality of his written work and his failure to vigorously perform administrative duties in the Department. At the conclusion of the foregoing discussion, the members of the English Department left the meeting, and the members of T & P continued to discuss plaintiff's case by themselves. During this latter discussion, one or more of the members of T & P suggested that, besides plaintiff's scholarly materials, T & P should review the various poems plaintiff had written which had not previously been submitted to it. It was agreed to do this. Subsequently, in accordance with this decision, Professor Harward asked Professor Petersson to obtain plaintiff's poems and forward them to T & P,

and Professor Petersson did so.

The T & P next considered the case on March 3, 1972. During the interim, some of plaintiff's poems had been circulated. During this meeting, the members of T & P discussed the various arguments that had been made by members of the English Department in favor and against an award of tenure to plaintiff, and also their own views of the quality of his Ph.D. dissertation and other written materials that had been submitted to them. At the conclusion of this discussion, a motion was made that plaintiff be recommended for tenure at Smith, and the motion was defeated by a vote of four to one. Professor George Dimock voted in favor of the motion. Dean Margaret Waggoner and Professors Vernon Harward, Peter Rose and George De Villafranca voted against it. Professor Vernon Gotwals abstained from voting on the motion because he felt that T & P had not discussed the case enough and he had not made up his mind, President Mendenhall as

Chairman of T & P had no vote since the rules of T & P provided that he would have a vote only when there was a tie among the other members.

Professor Dimock subsequently asked Professor Gotwals to prepare and submit a motion for reconsideration of plaintiff's case. Gotwals did so, submitting the request to President Mendenhall as Chairman of T & P on March 7, 1972.

On March 15, 1972, T & P met and voted 4-0, with two abstentions, in favor of Gotwals' motion. Thereafter there was further discussion of plaintiff's case. Professor Dimock moved that plaintiff be recommended to the Board of Trustees for reappointment with tenure. His motion failed for lack of a second.

On March 24, 1972, President Mendenhall wrote to plaintiff, informing him of the adverse decision by T & P and that his present appointment would be his last.

After plaintiff had learned that T & P

had voted against tenure in his case he spoke to Professor Petersson, who told him that he thought xenophobia was involved in the decision. At trial Professor Petersson testified that he was using the term xenophobia, which he defined as fear of foreigners or strangers, to refer not to any racial or national origin prejudice but rather to the tendency of some members of the English Department to be oriented restrictively to English literature rather than being open to the values of comparative literature.

On February 22, 1973, plaintiff made a written request to T & P for reconsideration. T & P met to consider plaintiff's request on March 3, 8, and 12, 1973. On March 29, 1973, President Mendenhall replied for T & P, rejecting plaintiff's petition.

On April 21, 1973, plaintiff and his wife met with Mendenhall to object to the March 29 letter. Mendenhall suggested that plaintiff take his case to the about-to-be-constituted Grievance Committee but plaintiff rejected this idea. On April 23, 1973, plaintiff wrote Mendenhall a memorandum detailing his objections to the March 29 letter. Mendenhall replied on April 26, 1973, repeating his suggestion that plaintiff take his case to the Grievance Committee. By letter of April 29, 1973, plaintiff again rejected the Grievance Committee idea and requested that the matter be placed in the hands of the Trustees at their next meeting, on May 5, 1973. When delivering this letter to Mendenhall, plaintiff again rejected Mendenhall's suggestion that the Grievance Committee be used.

President Mendenhall presented the matter to the Trustees by letter dated May 3, 1973. On May 5, 1973, the Trustees by resolution declined to act favorably to plaintiff.

Mendenhall so informed plaintiff by letter of May 7, 1973.

In May, 1973, Smith established the Grievance Committee, the business of which was to investigate and consider alleged violations of the Faculty Code. On June 28, 1973, plaintiff submitted a written grievance to the Grievance Committee. The Committee investigated and deliberated on plaintiff's petition throughout the next fall. The Committee voted on its decision on January 10, 1974 and issued its findings on January 28, 1974. It decided that the procedures followed in the consideration of plaintiff's case had been irregular for the following three reasons: (1) Professor Skulsky was permitted to change his vote following the initial meeting of the English Department in November, 1971, without a reconvening of the English Department; (2) Professor Connelly, following the meeting of the English Department in November, 1971,

had failed to transmit the vote on plaintiff's case that had been taken at the meeting to T & P in the manner prescribed by the Code, and (3) Professor Connelly, following the meeting of February 19, 1972 between the members of the English Department and the Committee on Tenure and Promotion, had improperly failed to inform plaintiff that the Department vote on his case was in fact a tie. The Committee sent copies of its decision to President Mendenhall as Chairman of T & P and to Professor Pickrel, then chairman of the English Department.

After receiving the Grievance Committee's decision, President Mendenhall sought the advice of the American Association of University Professors ("AAUP"). After consultation with AAUP he determined (1) that the reconsideration of plaintiff's case should be conducted by the members of the English Department and by the members of T & P who were then eligible to vote (as opposed to those who had actually considered plaintiff's case in 1971-72) and

(2) the evidence to be considered during the reconsideration should be restricted to that available at the time of the original consideration. On February 5, 1974, T & P met and voted unanimously to accept the report of the Grievance Committee and to comply with its recommendations. T & P also voted, in accordance with President Mendenhall's proposals, that in reconsidering the case the Department of English should be directed to operate with its "current personnel who were eligible to vote on the matter," and to consider only "the evidence or material available at the time of the original decision." On February 6, 1974, President Mendenhall wrote to the Chairperson of the Grievance Committee informing him of T & P's decision regarding reconsideration of plaintiff's case and asking to be notified if the Grievance Committee disagreed with any of the procedures T & P proposed to follow. At no time did the Grievance Committee express any such

disagreement.

On February 10, 1974, in accordance with the directive of T & P, the permanent members of the English Department then eligible to vote on plaintiff's case met and reconsidered the question whether he should be recommended for tenure. At this time plaintiff was in India and unaware that his case was being reconsidered. During this meeting, Professors Petersson, Young and Connelly once again urged that plaintiff should be recommended for tenure, citing his abilities as a teacher and the range of his experiences and knowledge of other languages and literatures. At the same time, various other members of the Department who were then present, including Professors Harward, Ellis, Skulsky, Bramwell, and Francis Murphy (who had been on sabbatical during the original consideration of plaintiff's case in 1971-72) urged that he should not be recommended for tenure, citing the poor quality of his written work and his failure to

perform administrative duties in the Department vigorously. At the conclusion of the foregoing discussion, the members of the Department voted seven to four against recommending plaintiff for tenure. Those voting against recommendation were Professors Harward, Ellis, Pickrel, Skulsky, Bramwell, Murphy, and Kern (who had not been employed in the English Department at Smith in 1971-72), and those voting in favor of recommendation were Professors Petersson, Young, Connelly, and Van Voris (who had been on sabbatical during 1971-72). Professor Shook (who had not been eligible to vote in 1971-72) abstained from voting. Professor Kern had been a colleague of plaintiff only in his terminal year and had never observed his teaching.

On February 12, 1974, Professor Pickrel sent a letter to President Mendenhall as Chairman of T & P reporting the new vote of the English Department on plaintiff's tenure case. A copy of this letter was also sent to plaintiff

in India and in care of his father-in-law in Canada.

On the dame day, President Mendenhall wrote plaintiff, informing him for the first time of the procedure which had been adopted for reconsideration and that he would notify plaintiff as soon as T & P had completed its review. Plaintiff cabled Mendenhall from Rome on February 25, 1974 as follows: "Postpone Tenure Consideration Until Return Question Procedure."

In February, March, or April 1974, the members of the English Department, except Professor Young, sent separate confidential letters to President Mendenhall explaining their votes.

On March 5, 1974, plaintiff sent to President Mendenhall a letter in which he stated that he was "astonished" to learn that the Department of English had voted on his case while he was out of the country, and questioned the rule that had been established

against the admission of any new evidence during the reconsideration of his case.

Plaintiff then stated in his letter as follows:

> I am submitting with this letter those items of evidence which I could and would have submitted to the Tenure Committee at the time of the original vote in 1972, had I the chance to respond to anything other than a favorable vote (as stated in my petition to the Grievance Committee).
>
> Of the three articles included herewith, two were seen by the Tenure Committee in manuscript, with letters of acceptance from the concerned journals, the third essay on Pound had already been commissioned by the Journal of American Studies and Research. All three derive from my thesis.
>
> I also want to draw your attention to the lepters from Professors Helen Muchnic, Della Terza and Levin which are already on file as well as to any letters or petitions from students (written on the basis of the then available evidence of my teaching) which may have been submitted to the relevant authorities at Smith.
>
> The following people are writing to the Tenure Committee in my behalf:

Ignazio Silone	Joel Porte
Dimitri Ivanov	Lowry Nelson
(Jean Neuvecelles)	Aleksis Rannit
Harry Levin	Daniel Javitch
Robert Fitzgerald	James Laughlin
Daniel Aaron	Dan Seltzer
	Renata Poggioli

I trust that the Tenure Committee will judge my case on its merits.

Of the three essays enclosed with the foregoing letter, the only one that had not been considered by the English Department and T & P during the original consideration of plaintiff's case was the essay on Pound, which was entitled "Formality and Intimacy in The Cantos of Ezra Pound." This essay was not begun by plaintiff until February or March of 1972, which was after the English Department had originally considered his case.

On March 8, 1974, President Mendenhall, on behalf of T & P, sent a letter to plaintiff in which he stated as follows:

> I wish to acknowledge your letter to the Committee on Tenure and Promotion and to thank you for sending the enclosed material.
>
> The Committee would be grateful if you make available other material

which they had had the opportunity to read in 1971-72, i.e. your thesis and some poems which were then in typescript.

All the material which was available in 1971-72 including the letters written by the then members of the department and letters received from outside the college are part of the file which will be considered by the present Committee.

On March 11, 1974, plaintiff responded to President Mendenhall's letter by writing as follows:

Thank you for your letter. I am enclosing the poems you asked for as well as some papers which your office sent to me by mistake.

About my thesis, both the final copies are in Harvard University Library. I am sure that Harvard would send them to you if you asked. The copy of the thesis which the Tenure Committee saw in 1972 was a provisional copy and a working draft. I had submitted it to the department with those reservations.

May I also draw your attention to the chapter of my thesis entitled "Allegory and Structure." With minor modifications, it will be published in The Yearbook of Italian Studies.

If it is of interest to the Tenure Committee, I am at present working on two essays - "Dante and

the Provencaux" and "Space as Medium and Symbol in Antony and Cleopatra."

In his letter to T & P explaining his positive vote for plaintiff during the English Department reconsideration, Professor Petersson raised a question as to whether, at the time it reconsidered plaintiff's case, the English Department had had adequate legal advice concerning the procedures it was to follow, specifically questioning the rule that no new evidence should be considered.

T & P met on April 18, 1974 and discussed Petersson's complaint. It was agreed that President Mendenhall would seek written confirmation of the AAUP advice and would consult counsel.

On April 25, 1974, President Mendenhall sent a letter to Professor Petersson in which he stated as follows:

> On April 16th you formally replied to the request from the Committee on Tenure and Promotion for your letter of support for Mr. Benerjee. You said that your previous letter of support still represented your position so that is where that matter stands.
>
> ...

As for the position which the College has taken in connection with the review of Mr. Banerjee's case as instructed by the Committee on Grievance, the basis of the recommendation which I made to the English Department in February this year was the best I could get from the AAUP as well as Mr. Larsen, and the position taken seems to me to be the only possible one under the circumstances: in the first place, it is not realistic nor desirable to attempt to recreate either the department or the committee that sat on the case in 1971-72 so all those presently available, eligible, and functioning should sit on it; secondly, it seems reasonable and realistic since Mr. Banerjee has not taught at Smith since June 1973 that the case should be decided on the evidence available in 1971-72 and no further information should be sought.

I don't know what you mean by missing documents and I certainly think you should come forward immediately and explain that fact. Since Mr. Banerjee is no longer here and teaching it would be impossible for anyone presently to visit his classes. Therefore all those who have to vote on the matter now must refer to the written records of visits as they were available in 1971-72.

I would suggest aht you come and discuss all this with me for I cannot see that your charges are in fact warranted.

On or about May 11, 1974, Professor Petersson responded to President Mendenhall's letter of April 25, 1974 by sending him a second letter in which he stated that the missing documents he had been referring to in his earlier letter were two reports on plaintiff's teaching -- one prepared by Professor Ellis, and one prepared by Professor Petersson himself. While Professor Ellis had been able to find a copy of his teaching report on plaintiff in his own files, Professor Petersson stated that he himself did not have a copy of his report in his file, and, as a result, he had been forced to reconstruct the report as best he could from his own memory. While making the foregoing statements, Professor Petersson neither then or later made any suggestion that either report had been deliberately removed from plaintiff's file.

On April 24, Mendenhall wrote to the AAUP asking confirmation of the advice that "the evidence used (reports on teaching, publications,

etc.) should be as of 1971-72 rather than 1973-74." He contrasted "evidence available at the time of the original decision" with "additional material that might have appeared since then." Again he gave no particulars of the case. On May 2, Mr. Kurland of the AAUP confirmed his advice. He still understood Mendenhall to be distinguishing between new and old accomplishments.

On or about May 7, 1974, in response to the question plaintiff had raised in his March 11, 1974 letter as to whether the Department of English had read the correct copy of his Ph.D. dissertation, President Mendenhall sent a memorandum to each of the members of the English Department who had participated in the reconsideration of plaintiff's case at the meeting of February 10, 1974, in which he stated as follows:

> In the course of the original consideration of this case by the Department and the Committee on Tenure and Promotion (November 1971-March 1972), Mr. Banerjee was asked

to make available a copy of his thesis. It is my understanding that he made available his own uncorrected copy and that the official copy at Harvard in fact contained some corrections. Although there has never been any indication to my knowledge that these corrections are either extensive or significant, I remain greatly concerned that the College's handling of this case be as procedurally correct as circumstances will allow us to make it.

It is in that spirit that I have asked the Neilson Library to borrow the official copy of the thesis. It is now over here and this memorandum is to request formally that those involved in the February 1974 vote proceed to the Library and read or reread it as soon as possible. The next step should be for the Chairman to reconvene the meeting and call for another vote.

If the result remains the same as on February 10, 1974, he should inform the Committee on Tenure and Promotion of that fact, noting that the official copy of the thesis was made available. In such a case individuals need merely notify the Committee that their original letters stand. If a vote is changed on this second voting, the Chairman's letter will report the new result and any individuals who changed their votes would have to write new letters to the Committee.

On May 9, 1974, T & P met and, during a discussion of plaintiff's case, agreed that

when the members of the English Department read the corrected copy of plaintiff's Ph.D. dissertation, they should also read copies of the various poems which had been submitted to T & P during the original consideration of plaintiff's case.

On May 13, 1974, Professor Pickrel, in accordance with the decision of T & P, distributed to each of the eligible voting members of the English Department copies of the poems that had been previously submitted to T & P.

On or about May 14, 1974, Professor Van Voris made a request to President Mendenhall that T & P also distribute to the members of the English Department who were eligible to vote on plaintiff's case copies of all the letters that persons from outside Smith had written to T & P in the preceding months in support of plaintiff's tenure candidacy. On or about May 16, 1974, President Mendenhall, on behalf of T & P, responded to Professor Van Voris' request by sending him a letter which stated

as follows:

> The Committee on Tenure and Promotion has considered your suggestion that it distribute to the Department of English copies of letters about Mr. Banerjee sent to the Committee. The decision is not to do so because the Committee does not feel it is proper to share with other persons letters addressed to the Committee. In passing, the Committee observes that the writers had the opportunity of addressing such letters to the Department and Mr. Banerjee had the opprotunity so to request the writers. Finally, both the Committee and the Department are operating on the premise that only evidence available in the 1971-72 decisions on the case should be considered in the review.

On May 15, 1974, plaintiff himself met with President Mendenhall in his office and discussed, among other things, the procedures that were being followed in the reconsideration of his case. He stated to President Mendenhall that, in his view, it was improper to prevent him from submitting during the reconsideration of his case copies of written work, such as his essay on Ezra Pound, which he had completed since the original consideration of his case. At or about the conclusion of the foregoing

discussion plaintiff made a specific request to President Mendenhall that he be permitted to appear personally before T & P during the Committee's reconsideration of his case. Also, at or about this time, plaintiff handed to President Mendenhall a set of handwritten notes in which he suggested to President Mendenhall that racism was involved in the denial of tenure to him.

On May 20, 1974, the members of the English Department who were then eligible to vote on plaintiff's case met and discussed once again whether plaintiff should be recommended for tenure at Smith. At the conclusion of this meeting, the members voted six to four against recommending plaintiff for tenure. Those voting against recommendation were Professors Harward, Ellis, Pickrel, Skulsky, Murphy, and Kern, and those voting in favor of recommendation were Professors Petersson, Young, Van Voris and Connelly. Professor Shook once again abstained from voting on the

question. Professor Bramwell, who had previously voted against recommending plaintiff for tenure, was on sabbatical.

Also on May 20, 1974, following the vote of the members of the English Department on the question of plaintiff's tenure, Professor Pickrel, as Chairman of the Department, sent a letter to President Mendenhall, as Chairman of T & P reporting the results of the vote. Subsequently, on May 23, 1974, Professor Pickrel sent a letter to plaintiff reporting the results of this vote.

On May 20 or 21, 1974, each of the members of the English Department who had voted on the reconsideration of plaintiff's case sent a separate confidential letter to President Mendenhall explaining his or her vote on such reconsideration. In each of these letters the members of the Department reaffirmed their earlier letters.

On May 23, 1974, each of the foregoing members of the English Department, except for

Professor Murphy, who was ill, met with T & P and discussed plaintiff's tenure case. President Mendenhall began the discussion by "reminding all present that the American Association of University Professors had advised that all discussion of the current reconsideration should be confined to what was known of the candidate at the times of the votes in 1971-72." Discussion focused primarily on the dissertation. During this discussion, in response to the notes that plaintiff had left with President Mendenhall on May 15, 1974, the members of T & P asked the members of the Department if any consideration had been given to plaintiff's race or national origin during the consideration of plaintiff's case. The members of the Department unanimously responded that no such consideration had been given to plaintiff's race or national orign. After the department members left, "(i)t was again agreed that the Committee on Tenure and Promotion would not

weigh letters on Mr. Banerjee's behalf received during the early months of 1974 -- this decision being in accordance with the recommendation of the American Association of University Professors."

On May 27, 1974, T & P met and, during a discussion of plaintiff's case, decided not to request or allow plaintiff to make a personal appearance, as he had requested during his May 15, 1974 meeting with President Mendenhall. The Committee also decided that it would not take note of the various letters that had been written in plaintiff's behalf during the preceding months since any such consideration would be inconsistent with the vote the Committee had previously adopted that, during the reconsideration, no new evidence that had not been available at the time of the original consideration in 1971-72 should be considered.

On May 29, 1974, T & P met and again discussed plaintiff's case. At the conclusion of the discussion the members of T & P voted

unanimously to accept the recommendation for tenure. President Mendenhall did not vote. Those present, in addition to Mendenhall, were Professors Harward, Gotwals, Hoyt, Kenyon, and Horner and Dean Dickinson.

On June 1, 1974, President Mendenhall, on behalf of T & P, notified plaintiff in writing that T & P once again had voted that he should not be awarded tenure at Smith.

Smith's current position, taken in this litigation, is that

> Plaintiff was denied tenure because he did not receive the requisite number of votes from members of the Committee on Tenure and Promotion of Smith College. Since the vote of the Committee was a group decision, no single reason or set of reasons can be provided as to why the Committee voted as it did. In general the Committee determined, based on all of the materials that were available to it, that the breadth and depth of the plaintiff's scholarship, considered in conjunction with the quality of his teaching and his service to the college, did not in the Committee's best judgment warrant an award of tenure ...

Plaintiff was not given any explanation for not being offered a further reappointment

in June 1973 other than the fact that he had not been granted tenure. From time to time, however, Smith has made arrangements to continue the employment of non-tenured faculty members beyond six or seven years. The arrangement has usually been referred to as a "long term contract." These contracts have exceeded the customary 3-year appointment specified by the Code. In three cases the contract was until retirement (Von Klemperer, Kung, Wallfisch). Generally, the individuals awarded these contracts were specialists in a foreign language or the performance of a musical instrument. Professor Von Klemperer, in the English Department, was an exception to this general pattern. She taught full-time at Smith from her arrival in 1952 until the birth of her child in 1955. Thereafter she taught part-time until 1972, when she began teaching full-time again. In 1969 she was awarded a long-term contract until retirement because of her usefulness as a

teacher and administrator. Once she began teaching full-time again she was considered to be back on the tenure track, and she was awarded tenure in 1974.

On or about July 22, 1974, plaintiff filed complaints against Smith with the Equal Employment Opportunity Commission ("EEOC") and the Massachusetts Commission Against Discrimination ("MCAD"), alleging that

> Smith College, through its agents and employees, denied me tenure and employment on the Faculty. Smith College has continuously and flagrantly denied me fundamental rights and procedural process which were granted to other faculty members. The denial of these fundamental rights and procedural due process were based in part on my race and/or national origin.

On or about September 19, 1976, the EEOC issued a notice of right to sue letter to plaintiff, allowing 90 days to file suit under Title VII of the Civil Rights Act of 1964. On or about December 9, 1976, plaintiff commenced the present action in this Court.

At the time plaintiff was initially

considered for tenure in the English Department at Smith in the fall of 1971 there were 26 full-time members of the English Department, 13 of whom had tenure. Of the 13 tenured members of the Department, only two, Professors Randall and Aaron, were expected to reach their normal retirement age prior to 1981.

At the time plaintiff was considered, Smith had no quota or fixed number of tenure positions. However, on February 15, 1952, the Board of Trustees had passed the following resolution with respect to the award of tenure:

> In the interest of maintaining relatively high salaries for those members of the faculty who are professors and associate professors, of assuring the flexibility necessary to adapt to changes in student elections, of offering to junior members of the faculty opportunities for advancement, and of making possible the introduction of needed changes in subject matter, in method, or in point of view, the Board of Trustees believes that the administration of the College should seek to maintain a reasonably even distribution of the teaching faculty as between the two senior ranks (Professor and Associate Professor) and the two junior ranks (Assistant Professor and Instructor).

> The Board is further of the opinion that the same principles of distribution should apply as between those on temporary appointment and those on permanent tenure. To that end it urges that in no department should all members of the teaching staff be on permanent tenure, and that in departments having more than five members not more than two-thirds of the staff should be on permanent tenure. In the larger departments the proportion should rarely exceed sixty percent.
>
> The Board proposes that no exceptions to these general principles be allowed except after the most careful consideration by the Committee on Tenure and Promotion, its action to be ratified by a special vote of the Board of Directors.

Smith continued to tenure professors in the English Department after plaintiff's case. Courses taught by plaintiff have continued to be offered up to the present. As explained by Smith, "The English Department does not operate by filling slots. When an old member of the Department leaves, or a new member arrives, there is a regrouping of courses assigned particular teachers."

When Mr. Banerjee first arrived at Smith College in 1966-67, there was no program in

Comparative Literature. In October of 1967, Mr. Banerjee became one of twelve faculty members to form the "Ad Hoc Committee on Comparative Literature Major" and to petition the Committee on Educational Policy (CEP) for adoption of such a program. After meetings by the CEP, the Interdepartmental Major in Comparative Literature was adopted by the faculty on January 24, 1968. The major was limited to honors students. It was, at that time, a "double major", i.e., in effect a major in two literatures. In 1969-70, plaintiff served as advisor to the major.

In June of 1969, President Mendenhall took action in relation to a search for a professor to fill the Doris Silbert Chair in humanities and who would also serve in French and Comparative Literature. The teacher "would be able and interested in helping our inter-departmental work in comparative literature." He specified a "male candidate." The search continued into 1969-70, with President Mendenhall

still specifying the need for a male, who would "play a role in our growing comparative literature program." Finally, in 1971-72, the year of plaintiff's tenure consideration, the search focused on Professor Edith Kern. She was in that year appointed a member of both the English and French Departments. It was understood that she would develop a program in Comparative Literature. Professor Kern assumed her duties in 1972-73, the last year of plaintiff's employment at Smith. She spent most of that year reviewing the Comparative Literature program. In February of 1973, the CEP recommended, and the Faculty adopted, a major revision and broadening of the program. The revision made the major available more broadly, nor merely to honors students. For the first time, courses were offered specifically in Comparative Literature, and three such courses were required for graduation in the major. The faculty adopted five Comparative Literature courses, in addition to a Comparative Literature

seminar and courses cross-listed in other departments.

Upon adoption of the revised major, the question of creating a Comparative Literature Department was raised by President Mendenhall. This suggestion was not acted on at that time. It was agreed that Professor Kern would serve as adviser to the major, and would appoint an "Executive Committee" to advise in its administration.

In 1974-75, the Comparative Literature program began its revised operations in full.

In January, 1975, the faculty approved an additional Comparative Literature course. In January, 1976, the faculty approved still another Comparative Literature course. In February of that year three more courses were adopted. In January, 1978, three more courses were approved, and in March a fourth.

By 1978-79, the Comparative Literature major listed a total of 19 courses. The description of the major consumed four pages

of the Smith College Bullein. By contrast, in 1968-69, the major had listed a single course (a "Special Studies" tutorial) and was described on a half page of the catalogue.

In 1977, Smith advertised an opening for "Assistant Professor to teach intermediate and advanced courses in Comparative Literature, training in critical theory, 3 or more literatures, and several years of teaching experience." Smith appointed Ann Jones to this position, to start in 1977-78.

On March 23, 1978, the Comparative Literature Executive Board wrote to President Jill Conway to propose the formation of a Comparative Literature Department. The Board reported that enrollments were "healthy and rising" and that many new courses were being proposed, but that Ann Jones, the newly added assistant professor, was "the only member of the Program whose primary commitment is to Comparative Literature" and that "the number of faculty members qualified and willing to teach Comparative courses in limited."

In the five year period from June, 1969, until June, 1974, three people were granted tenure in the English Department: Professors Harold Skulsky, Edith Kern, and Dean Flower.

The following table shows denials of tenure at Smith College in 1971-75 (in addition to denial to plaintiff):

Name	Race	Year	Action Taken
Maurianne Adams	Caucasian --White	71-72	Denied tenure by T & P after English Department, by a vote of 7-1, had recommended against tenure.
Mary Carruthers	Caucasian -- White	71-72	Denied tenure by T & P after English Department, by a vote of 8-0, had recommended against tenure.
William Youngren	Caucasian --White	71-72	Resigned after being informed by English Department that tenure was in doubt.
David Cavitch	Caucasian --White	71-72	Denied reappointment by English Department.

Name	Race	Year	Action Taken
Gary McGown	Caucasian --White	71-72	Denied reappointment by English Department.
Delia Burke	Caucasian --White	72-73	Resigned after being offered terminal one-year appointment by English Department.
George Fayen	Caucasian	74-75	Denied tenure by T & P after English Department, by a vote of 5-3, had recommended against tenure.

Professor Kern was specifically recruited by President Mendenhall in 1972 to fill the position of Doris Silbert Professor of Comparative Literature at Smith. At the time she was recruited, Professor Kern had already achieved the position of full Professor at the University of Washington and had written and published numerous books and articles. Professor Kern was also assigned to teach courses in the Department of French Language and Literature at Smith.

Professor Skulsky was presented for tenure in 1969-70. His was the English Department tenure case immediately preceding plaintiff's. At the time of his consideration for tenure, Professor Skulsky had written, in addition to his Ph.D. dissertation, the following articles (none of which was derived from his dissertation)which had either been published or accepted for publication:

a. "Aristotle's Poetics Revisited, Journal of the History of Ideas, April, 1958.

b. "Pain, Law and Conscience in Measure for Measure," Journal of the History of Ideas, April, 1964.

c. "King Lear and the Meaning of Chaos," Shakespeare Quarterly, Winter, 1966.

d. "Paduan Epistemology and the Doctrine of One Mind," Journal of the History of Philosophy, October, 1968.

e. "Literature and Philosophy: The Common Ground," Journal of Aesthetics and Art Criticism, Winter, 1968.

f. "Revenge, Honor and Conscience in Hamlet," accepted for publication by the Modern Language Association in November 1968.

Also, before the consideration of his case, Professor Skulsky was preparing a book on Shakespeare's plays that included, in addition to three of the articles listed above, a second study of Hamlet, and two studies of Othello conceived especially for the book.

During the initial meeting of the English Department on Skulsky's case, on November 7, 1969, the department voted 5-5 on the question whether to recommend tenure. On November 14, 1969, the Department met again and voted 7-3 against recommending tenure. In the interim, Professor Harward, then Chairman of the Department, had written to Professor Connelly, on leave in Greece, inviting him to vote on Skulsky's case, and Connelly, on November 11, 1967, sent a letter, indicating that he wanted to vote affirmatively and setting forth the reasons for his vote. The vote in the Department, counting Connelly's was 7-4 against recommending tenure and was so transmitted to T & P. Thereafter, each voting

member of the Department sent a letter to T & P explaining his vote. One of the professors who had voted against Skulsky at the meeting voted in his favor in his letter to T & P. Two members of the English Department who because of their rank or tenure status had not been eligible to vote on Skulsky's case nevertheless wrote to T & P expressing their support for Skulsky. On February 20, 1974, T & P met and discussed the merits of Skulsky's case. During this discussion, various members of the Committee stated that in their view, Professor Skulsky's scholarly attainments were of a peculiarly high order and that they appeared to outweigh the rigidities of his personality on which various members of the English Department had commented in their letters to T & P as the principal reason why they could not support tenure for Skulsky. On March 4, 1980, T & P met again and voted unanimously to recommend Skulsky for tenure.

Professor Dean Flower was considered for

tenure in academic year 1973-74. The members of the English Department who participated in the consideration of Professor Flower's tenure case, and their votes, were as follows:

Name	Vote
Kenneth Connelly	Affirmative
Frank Ellis	Affirmative
Vernon Harward	Affirmative
Edith Kern	Negative
Francis Murphy	Affirmative
Robert Petersson	Negative
Paul Pickrel	Negative
Richard Young	Affirmative

Professor Bramwell also wrote a letter to T & P in support of tenure for Professor Flower, but she did not vote on the case. Professor Skulsky did not vote on Professor Flower's tenure case. The English Department's recommendation for tenure was approved by a 5-1 vote of T & P.

Letters written by members of the Department to T & P explaining their votes in Flower's case reveal divergent opinions of

Flower's writing, ranging from Professor Connelly's comment that "his publishing record since 1971 is one of the best in the Department" (Exhibit 327), and Professor Ellis's comment that "(t)he list of Mr. Flower's publications is a page long ... (t)here can be no doubt that he is totally involved in and devoted to scholarship (Exhibit 328), to Professor Kern's comment that "(h)is publications consist mainly of brief reviews, some of them in publications as little attaining to scholarship as the Hampshire Gazette ... his scholarly achievements and prospects seem far from excellent" (Exhibit 330).

President Mendenhall testified at trial that in the 1960s it was difficult to locate qualified faculty but that in the 1970s the college found itself confronted with a glut of qualified applications. This situation is also reflected in a letter of February 10, 1974 to T & P from Professor Petersson (a staunch supporter of plaintiff), written in

opposition to an award of tenure for Dean Flower:

> When we consider the future of the College- at least this department of it - and we try to do the best we can for it, then it would be unwise, it seems to me, not to recognize the new professional situation we are in. For me it has become impossible not to compare someone up for tenure with alternative people one knows to exist, for that is the very reality we face. And that comparison is both with other people on this campus now, in the English field, and with other people available or attainable... In my judgment, if we yield in lesser cases, we will necessarily withhold tenure from more deserving people yet to be judged... This is, after all, a golden moment for strengthening the faculty.

Exhibit 332, pp 2-3.

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1475.

DIBYENDU K. BANERJEE,
Plaintiff, Appellant,

v.

BOARD OF TRUSTEES OF SMITH COLLEGE, ET AL.,
Defendants, Appellees.

ORDER OF COURT

Entered: May 14, 1981

Defendants, appellees are ordered to file six copies of a brief, by 10:00 A.M. on May 27, 1981, in xerox form, responding to plaintiff, appellant's petition for rehearing.

By the Court:

Clerk.

(cc: Messrs. Stern and Patton)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1475.

DIBYENDU K. BANERJEE,
Plaintiff, Appellant

v.

BOARD OF TRUSTEES OF SMITH COLLEGE, ET AL.,
Defendants, Appellees.

Before Coffin, Chief Judge
and Aldrich, Circuit Judge.

ORDER OF COURT

Entered: June 19, 1981.

The petition for rehearing is hereby denied and;

The motion to preserve tapes of oral argument is denied.

By the Court

Clerk.

(cc: Messrs. Stern and Patton)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1475.

DIBYENDU K. BANERJEE,
Plaintiff, Appellant,

v.

BOARD OF TRUSTEES OF SMITH COLLEGE, ET AL.,
Defendants, Appellees.

Before COFFIN, Chief Judge,
ALDRICH, CAMPBELL AND BOWNES, Circuit Judges.

ORDER OF COURT

Entered: June 26, 1981

The panel of judges that rendered the decision in this case having denied the petition for rehearing, and no judge who was a member of the panel nor any judge in regular active service having requested a vote on the suggestion for rehearing en banc,

It is ordered that the suggestion for rehearing en banc is hereby denied.

By the Court:

Clerk.

(cc: Messrs. Stern and Patton)

Opposition

Office - Supreme Court, U.S.
FILED
NOV 3 1981
ALEXANDER L. STEVAS
CLERK

No. 81-686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DIBYENDU K. BANERJEE,

Petitioner

v.

BOARD OF TRUSTEES OF
SMITH COLLEGE, ET AL.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS BOARD OF TRUSTEES OF SMITH COLLEGE, ET AL. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether it was error, in an employment discrimination case under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, upon the failure of the defendant to articulate a clear and specific legitimate, non-discriminatory reason for its action in rebuttal to the prima facie case, for the Court to rely upon an explanation not asserted by the defendant.

2. Whether, in an employment discrimination case under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, the standard of review on appeal of the ultimate finding is that of whether the District Court was "clearly erroneous".

3. Whether, in an employment discrimination case under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, a District Court is required to make findings as to the individual reasoning of the persons who participated in the decision.

PARTIES

Petitioner and respondents are identified in the petition.

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No. 81-686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DIBYENDU K. BANERJEE,

Petitioner

v.

BOARD OF TRUSTEES OF
SMITH COLLEGE, ET AL.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS BOARD OF TRUSTEES OF SMITH COLLEGE, ET AL. IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-10) is reported at 648 F.2d 61 (1st Cir. 1981). The opinion of the Court of Appeals denying rehearing (Pet. App. 11-14) is not reported. The Memorandum of Decision of the District Court (Pet. App. 15-63) is reported at 495 F. Supp. 1148 (D. Mass. 1980). The subsidiary findings of the District Court (Pet. App. 64-122) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1981. Rehearing was denied on June 19, 1981, and a suggestion of rehearing *en banc* was denied on June 26, 1981. The petition for certiorari was filed on September 17, 1981 and docketed on October 9, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTES AND RULE INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981, are set forth at Pet. 7.

Rule 52(a), Fed.R.Civ.P., provides in pertinent part as follows:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

STATEMENT OF THE CASE

Petitioner, a naturalized citizen of the United States born in Calcutta, India, was employed in the Department of English at Smith College in Northampton, Massachusetts. He was initially considered for tenure in academic year 1971-72, and his candidacy was reconsidered in academic

year 1973-1974. All in all, 20 persons from both the Department of English and the Tenure and Promotion Committee considered and voted on petitioner's candidacy, and 15 voted against tenure. On the basis of these votes, petitioner was denied tenure.[1]

The tenure process at Smith begins with a recommendation by the candidate's department (here the Department of English), which is transmitted to a Tenure and Promotion Committee composed of the President sitting *ex officio*, the Dean of the College, and five tenured professors elected from the faculty at large. If, as in petitioner's case, the Tenure and Promotion Committee votes against tenure, the process ends and tenure is denied.

The denial of tenure in petitioner's case was based on an assessment of his performance and reflected the determination of the Tenure and Promotion Committee that "the breadth and depth of [petitioner's] scholarship, considered in conjunction with the quality of his teaching and his service to the college, did not in the committee's best judgment warrant an award of tenure" (Pet. App. 4).

Each member of the English Department who voted in petitioner's case was required to send a letter to the Tenure and Promotion Committee explaining his or her vote. These letters were introduced in evidence and are summarized in the District Court's subsidiary findings (Pet. App. 71-80). The thrust of these letters, as well as the testimony of their authors and the members of the Tenure

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[1] The District Court's memorandum of decision (Pet. App. 15-44) was accompanied by extensive subsidiary findings of fact (Pet. App. 62-122) which, together with the chronological table in the Court's opinion (Pet. App. 44-52), provide a complete description of the operative events in the case.

and Promotion Committee, was the same — that deficiencies in petitioner's scholarship precluded an award of tenure. Indeed, even petitioner's supporters conceded that his scholarship was disappointing, arguing instead that this deficiency was outweighed by his teaching ability and his training in comparative literature (Pet. App. 74-78).

In December, 1976, petitioner filed a complaint in the United States District Court for the District of Massachusetts alleging that the denial of tenure to him had been based on his race and national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 *et seq.*, and 42 U.S.C. § 1981. Petitioner named as defendants the corporate entity that is properly known as The Trustees of the Smith College (hereinafter "Smith" or "Smith College"), and eleven individuals, including Dorothy N. Marshall, who was named only in her official capacity as Chairman of the Board of Trustees of Smith College, Jill K. Conway, who was named only in her official capacity as President of Smith College, and nine other individual defendants who were present or former professors or officers of Smith and who served either in the English Department or on the Tenure and Promotion Committee in the consideration or reconsideration of petitioner's tenure case.[2]

Following the filing of the complaint, the parties engaged in extensive discovery including, among other things, the

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[2] These nine other individual defendants were: Professors Vernon Harward, Joan Bramwell, Frank Ellis, Harold Skulsky and Edith Kern — all of the English Department — and Professor Vernon Gotwals (Music Department), Dean Margaret Waggoner, President Thomas Mendenhall and Professor George DeVillafranca (Biology Department — deceased as of December 25, 1977) of the Tenure and Promotion Committee.

answering of interrogatories, the taking of 19 oral depositions, and the production by Smith of several hundred documents, including each of the letters which had been written by members of the English Department during the consideration and reconsideration of petitioner's case. Thereafter, in December, 1979, the parties entered into an extensive stipulation of facts and also, pursuant to a pretrial order entered by the District Court, each side filed additional proposed findings of fact and conclusions of law upon which was indicated the acquiescence or objection of the opposing party.

Following the filing of the stipulated facts and additional proposed findings of fact, a nine-day trial was held before the Court on April 11, 16-18 and 21-25, 1980. More than 600 exhibits were introduced in evidence, and 20 witnesses testified. On June 30, 1980, the District Court issued its findings of fact and opinion (Pet. App. 15-122). The Court, ruling that petitioner had shown that his qualifications were such that a decision either to grant or to deny tenure would have been reasonable, held that he had made a *prima facie* case of employment discrimination.[3] The Court also ruled, however, that the defendants had demonstrated legitimate, nondiscriminatory reasons for the denial of tenure to petitioner, and that petitioner had failed to establish that these reasons were pretexts for racial or national origin discrimination.

Specifically, the District Court held that the evidence showed a closely divided department and that both posi-

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[3] After trial, petitioner invited the dismissal of the nine individual defendants who had voted against petitioner's tenure. In entering judgment for these defendants, the Court did not rely on petitioner's invitation, but explicitly found "no basis in fact or law" for holding the individuals liable (Pet. App. 16).

tions — for tenure and against — were reasonable.[4] The Court noted that "[t]he quantity of [petitioner's] scholarship was not impressive . . . ," and that "[i]t was sharply disputed whether the quality of his writing should be regarded as a negative factor." In these circumstances, the Court found no reason to overturn the judgment of the Tenure and Promotion Committee.

The Court of Appeals affirmed the judgment of the District Court in a thoughtful and thorough opinion (Pet. App. 1-10) and subsequently denied a petition for a rehearing *per curiam* (Pet. App. 11-14).

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals affirming the judgment of the District Court is consistent with the decisions of this Court and of other courts of appeal. The petition does not present any issue warranting review by this Court.

1. The first question suggested by the petition — whether the reasons given by Smith for denial of tenure were unduly vague and whether the District Court may rely

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[4] The Court expressly found the expert testimony offered at trial to be helpful on this point. At trial, Professor James E. Miller, Jr., Chairman of the English Department at the University of Chicago, testified as an expert witness. Professor Miller testified that in his opinion plaintiff's dissertation was "not well written . . . that there are problems in the style, getting down to the individual sentences and phrases" (Tr. 9-55), and that it was not well organized (Tr. 9-56). Professor Miller further testified that the dissertation was "not of the quality that would support my vote for tenure in a tenure decision" (Tr. 9-54) and that if the thesis had been presented to him as a director or reader, he would ". . . have attempted to persuade the student to make major revisions, basic revisions in the dissertation before bringing it to final oral examination." (Tr. 9-59).

on a reason supporting denial of tenure which was not asserted by defendant — is not presented in this case. Both the District Court and the Court of Appeals properly applied the principles of this Court's decision in *Texas Department of Community Affairs* v. *Burdine*, — U.S. —, 101 S.Ct. 1089 (1981). Thus, both courts held that establishment of a *prima facie* case requires the employer to come forward with legitimate nondiscriminatory reasons for the action taken. Smith properly discharged its burden through the introduction of both documentary and testimonial evidence with respect to why petitioner was denied tenure. As we have pointed out earlier, the overwhelming majority of persons who participated in petitioner's case voted against an award of tenure, and the evidence shows that these negative votes were based principally on a judgment that the quality of petitioner's scholarship was seriously deficient.

Petitioner, focusing only on a single answer to an interrogatory, claims that the reasons given were improperly vague. In fact, the answer to the particular interrogatory in question was sufficiently specific, but, more importantly, it was merely a convenient summary of the evidence which was to be adduced at trial. It is wrong, and quite misleading, to pretend that the interrogatory answer provided the only clue as to why persons voted against tenure in petitioner's case. There was ample evidence on this question at trial, and the Court of Appeals correctly held that this evidence ". . . more than met the requirements" of adequate specificity (Pet. App. 5).

Petitioner's second complaint is equally baseless. The District Court did *not* rely on a reason not asserted by Smith in finding legitimate, non-discriminatory reasons for the denial of tenure to petitioner. Rather, the District Court carefully considered and discussed the reasons given

by those who participated in the tenure decision-making process (Pet. App. 56-58).[5] On the other hand, the District Court's discussion of the increasing competition for tenured positions (Pet. App. 58-60), of which petitioner complains, was not in any sense a description of the reasons of the persons who voted against tenure. Rather, the Court was only responding to petitioner's argument that the reasons which the participants themselves had stated were pretextual because, as petitioner contended, his scholarship was as good or better than the scholarship presented by other persons who were granted tenure as many as ten years earlier by completely different members of the English Department and Tenure and Promotion Committee.

The suggestion that this response of the District Court was a "surprise" is disingenuous in the extreme. It was in fact a response to arguments made by petitioner, and it was entirely consistent with the evidence which was known to petitioner long before trial.[6]

The District Court correctly recognized that the important question in this disparate treatment case was whether petitioner was treated any differently than his peers by those who decided his case. The Court expressly and correctly found that he was not (Pet. App. 60-61), and,

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[5] The record in the District Court consists, among other things, of the testimony of 10 members of the Department and six members of the Tenure and Promotion Committee. As petitioner states, the record contains ". . . an extensive exploration of the reasoning of the individual participants . . ." (Pet. 33).

[6] President Mendenhall testified in his deposition in 1978 — two years prior to trial — that the 1970s witnessed a change from a scarcity to a glut of highly qualified candidates. And information furnished in response to interrogatories showed the decline in percentage of decisions resulting in tenure. See Pet. App. 9, n.10.

accordingly, properly held that petitioner had failed to prove that the reasons given for denial of tenure to him were pretextual.

2. Although the petition purports to raise a question concerning the application of the "clearly erroneous" rule, petitioner did not suggest in the Court of Appeals, and does not suggest now, what other principle of review could or should be applied. The contention of the petition that the District Court's legal conclusions were shielded from review by the invocation of the clearly erroneous rule (Pet. 33-35) is manifestly incorrect.

The Court of Appeals considered and properly rejected petitioner's arguments that the District Court made errors of law,[7] and it was only after concluding that there were no "underlying legal errors" that the Court of Appeals turned to the question of whether "the [district] court's failure to find for the [petitioner] on the evidence as a whole was clearly erroneous." (Pet. App. 7). The Court held that it was not, and, in the course of so holding, discussed each item of evidence which petitioner himself had chosen to emphasize. Thus, for example, the Court discussed the alleged "direct evidence" of discrimination referred to by petitioner and found that it consisted largely of "nonprobative evidence accompanied by speculation" (Pet. App. 9-10). It also found that the statistics pointed to by petitioner did not assist his case because they showed, among other things,

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[7] For example, the Court of Appeals agreed with the District Court's formulation of the *prima facie* case, which was exceedingly favorable to petitioner, and correctly observed that ". . . probative weight must continually be given to the evidence or inferences which established the prima facie case, but that it has no special magic, once defendants introduce evidence in rebuttal." (Pet. App. 6).

that when actual tenure decisions were considered, minority candidates as a whole had fared better than non-minority candidates over the period between 1960 and 1976 (Pet. App. 10). Specifically, as the Court of Appeals noted (Pet. App. 10), eleven minority group members (including petitioner) were presented for tenure during this period and nine were awarded tenure.

In the circumstances of this case, the Court of Appeals' application of the clearly erroneous rule to the District Court's evaluation of the evidence — recognizing the importance of the District Court's ability to assess the credibility of the witnesses in the context of all the evidence — was manifestly correct and presents no question warranting review by this Court.[8]

3. Based on extensive subsidiary findings, the District Court ruled that there was no evidence that any person, whether a member of the English Department or the Tenure and Promotion Committee, voted against petitioner on the basis of his race or national origin (Pet. App. 56-57).[9]

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[8] Whatever principles ought to govern in *United Steelworkers of America* v. *Swint*, No. 80-1193, *cert. granted* April 24, 1981, — U.S. —, 101 S.Ct. 1972, the District Court's ability in the present case to observe and assess the credibility of the 20 trial witnesses was critical to the determination of motivation. See, *e.g.*, Pet. App. 53-54 (District Court's findings regarding Professor Petersson's testimony). It is in precisely such a case that the clearly erroneous rule is particularly appropriate. See *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 332 (1952) (stating that "no case" is "more appropriate for adherence to [Rule 52(a)]" than one involving "a vast record of cumulative evidence as to long-past transactions, motives and purposes . . ."); *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341, 342 (1949) (holding that Rule 52(a) applies generally in reviewing "[f]indings as to the design, motive and intent with which men act.").

[9] The District Court explicitly found "no basis in fact or law" for holding the individual defendants liable. See n.3 *supra*.

The Court of Appeals correctly rejected the contention that the District Court was also required to make detailed findings as to the reasoning of each person who voted in petitioner's case (Pet. App. 9). Plainly, no purpose is served by the District Court's restatement of undisputed testimony, and the District Court did make detailed findings regarding the reasons assigned by various decision-makers. Professor Harward, of whom petitioner specifically complains, is a case in point. Professor Harward's views concerning petitioner's tenure candidacy are set forth in the District Court's subsidiary findings (Pet. App. 73, 75 and 79), and his evaluation of petitioner's scholarship was supported by the testimony of Professor James Miller, Chairman of the English Department at the University of Chicago, an expert witness whose testimony the District Court expressly found to be helpful (Pet. App. 58).

The assertion of a conflict between the decision in this case and that of the Fourth Circuit in *EEOC* v. *United Virginia Bank/Seaboard National*, 555 F.2d 403 (4th Cir. 1977) is baseless. In *United Virginia Bank*, the District Court stated its findings orally from the bench at the close of trial and the Court of Appeals observed that (555 F.2d at 405):

> "The findings of fact, on which the judgment was granted, were phrased in broad conclusory terms *and did not include any subsidiary findings which would give appropriate support to the Court's conclusory findings.*" (Emphasis added.)

In contrast, in the case at bar, as the Court of Appeals noted (Pet. App. 2):

> "... the court rendered an extensive opinion, 495 F. Supp. 1148: introduction and discussion of legal principles (7 pages); chronology (57 items, from application to final rejection); evaluative findings (3 pages), and subsidiary findings (28 typewritten pages, not published)."

There simply is no question concerning the adequacy of the District Court's findings that warrants review by the Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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